TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1957

No. 88

ARTHUR THOMAS, PETITIONER

vs.

STATE OF ARIZONA

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1956
CERTIORARI GRANTED MARCH 4, 1957

Supreme Court of the United States

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No. 88

ARTHUR THOMAS, PETITIONER

vs.

STATE OF ARIZONA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INDEX

[fol. 1] **IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA**

Phoenix Division

Docket No. Civ. 2386 Phx.

ARTHUR THOMAS, PETITIONER,

- VS -

THE STATE OF ARIZONA: ROBERT MORRISON, Attorney General of the State of Arizona; FRANK EYMAN, Warden of the State Penitentiary o the State of Arizona.

PETITION FOR WRIT OF HABEAS CORPUS—

Filed March 1, 1956

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

W. EDWARD MORGAN, counsel for the Petitioner, Arthur Thomas, being first duly sworn, upon his oath deposes and says:

That he is counsel of record in the State Courts of Arizona for the defendant Arthur Thomas in the following actions: State of Arizona vs. Arthur Thomas, in the Superior Court of the State of Arizona in and for the County of Cochise, Case No. 5931, and in the Supreme Court of the State of Arizona, Case No. 1045 and Case No. 1072.

That he makes this application on behalf of the defendant Arthur Thomas; that the defendant Arthur Thomas is a resident of the County of Cochise, State of Arizona, and a citizen of the United States of America.

That on the 26th day of June, 1953, said Arthur Thomas was found guilty by a trial jury and was sentenced to death by the Superior Court of the State of Arizona in and for the County of Cochise, for the murder of one Janie Miskovich.

That on the 18th day of October, 1954, the Supreme Court of the State of Arizona affirmed the decision of the

lower court and set the 5th day of January, 1955 as the date of execution.

That on the 16th day of November, 1954, petitioner's [fol. 2] motion for rehearing before the Arizona State Supreme Court was denied. That on December 2, 1954, the defendant, by counsel, moved for a new trial. That on December 18, 1954, the Superior Court of Cochise County, Arizona denied a motion for new trial. That on June 28, 1955, the Arizona State Supreme Court affirmed the decision of the lower court in denying the motion for the new trial and that said Court on that date set the 28th day of July, 1955 as the date for execution of the said Arthur Thomas.

That on December 5, 1955, the defendant, through this counsel filed with the United States Supreme Court a Petition for Writ of Certiorari, and that the United States Supreme Court, pending the determination of said Writ, granted a stay of execution. That on the 16th day of January, 1956, the United States Supreme Court, without opinion, denied the Writ of Certiorari. That on the 31st day of January, 1956, the Arizona State Supreme Court reset the date for execution of Arthur Thomas to March 7, 1956.

That Arthur Thomas is presently in the custody of Frank Eyman, Warden of the State Penitentiary for the State of Arizona at Florence, Arizona. That the said Arthur Thomas is held without right, for the reason that the Courts of Arizona were and are without authority to hold the said Arthur Thomas and that the Constitutional rights of said Arthur Thomas, which will be set forth with more particularity, were abridged and denied.

That transcripts of the proceedings in the trial in the Superior Court of the State of Arizona in and for the County of Cochise affirmatively show that on the date of apprehension, the defendant in that case, the party petitioner herein, Arthur Thomas, was roped and putitively lynched in the presence of Jack Howard, the then sheriff of the County of Cochise, State of Arizona.

That subsequent to said roping, and while under fear and coercion, the defendant in that case, the petitioner herein, Arthur Thomas, made certain statements, confes-

[fol. 3] sions of commission of the crime. That one of the said confessions, over the objection of counsel, was admitted into evidence, in violation of Article I of the United States Constitution and in violation of the Fourteenth Amendment to the United States Constitution. That further, in that action, petitioner herein Arthur Thomas was not granted the rights afforded under the Fourteenth Amendment to the United States Constitution, the right to due process, for the reason that by the actions of the Cochise County Attorney, the defendant Arthur Thomas was effectively denied the right of counsel; that this was accomplished when the said County Attorney engaged the services of an agent to contact the defendant while he was incarcerated in the County Jail of Cochise County, subsequent to the appointment of counsel for the defendant. That the sheriff of Cochise County, who was in control of said jail and who had daily contact with the defendant while he was in said jail, was the same sheriff who had been present when the putitive lynching took place, and who, according to the testimony of the Arizona State Highway Patrolman who was present, permitted the roping on more than one occasion and advised the defendant to admit his guilt or else he, the said sheriff, would let Arthur Thomas be hanged by the posse. That such circumstances, combined with the action of the County Attorney, destroyed the faith and confidence of [the defendant Arthur Thomas] in his attorneys and in truth and in fact resulted in [said defendant's] giving no aid or assistance or information to his counsel until after the time that the trial had started and during the course of that trial. That under the circumstances, said act on the part of [the defendant Arthur Thomas] in not aiding counsel was not by his own violition but was a result of the putitive lynching, the conduct of the sheriff and the conduct of the County Attorney, all in abridgement of [the defendant's] rights as a citizen of the United States of America.

[fol. 4] That further, the defendant was not afforded, at the time of his arraignment, the right of counsel, for the reason that he was not advised of his right to counsel

by the presiding magistrate. (In the course of the trial, the presiding magistrate testified in a conflicting fashion, once stating that he did advise the defendant of his right to counsel and once testifying in effect that he did not.)

For the reason that the date of execution has been set for March 7, 1956, pending the return of the Writ of Habeas Corpus your affiant petitions that this Court issue its Order to the proper authorities of the State of Arizona: to refrain and desist from executing the defendant until the matter of this petition for Writ of Habeas Corpus is finally determined.

And for all of the above reasons, and upon the basis of all of the above statements, your affiant prays this Court to issue a Writ of Habeas Corpus, directed to the Warden of the Arizona State Penitentiary, to show cause at a time and place to be set by this Court, why the defendant Arthur Thomas, in the custody of the said Warden, should not be released.

/s/ W. Edward Morgan
W. Edward Morgan
180 North Church
Tucson, Arizona
Attorney for Petitioner Arthur Thomas

• • • •

Duly sworn to by W. Edward Morgan. Jurat omitted in printing.

[fol. 4a] (File Endorsement Omitted)

[fol. 5] Affidavit of Service by Registered Mail—

(Omitted in Printing)

[fol. 6] In the United States District Court for the District of Arizona

Phoenix Division

(Title Omitted)

Memorandum of Decision and Order Denying Petition for Writ of Habeas Corpus—March 2, 1956

Giving the generalities of the petition fullest intendment, it is charged that a coerced confession was admitted

at the trial, over objection, and that because of certain acts and conduct of the sheriff and district attorney, defendant did not give his counsel aid, assistance and information prior to the time of the trial.

These sketchy allegations do not warrant Federal District Court interference with State process within Brown v. Allen, 1953; 344 U. S. 443, the leading case. Nor is it stated whether these matters have been previously presented to the State courts. Brown v. Allen; Daugharty v. Gladden, Ore. 1953, 128 F. Supp. 95.

The petition for a Writ of Habeas Corpus is therefore denied.

Dated March 2, 1956.

/s/ CLAUDE McCOLLOCH
Judge

(File Endorsement Omitted)

[fol. 7] • • • •

[fol. 8] • • • •

[fol. 9] • • • •

[fol. 10] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Phoenix Division
(Title Omitted)

MOTION AND PETITION FOR FURTHER HEARING—
March 8, 1956

Comes now EDWARD MORGAN, Attorney for Petitioner ARTHUR THOMAS, and respectfully moves the Court to set a day and time for a further hearing on the Petition for Writ of Habeas Corpus filed herein, in order to present to the Court witnesses to be called by the Petitioner to sustain his allegations contained in said Petition for Writ of Habeas Corpus, to-wit:

HARRY SELCHOW, State Highway Patrol Officer, who was present at the time of the putitive lynching of the petitioner;

MR. CHRIS COLE, "Arizona Daily Star" reporter at the time of the putitive lynching, who made an investigation at the time;

WILLIAM SAUDERS, a photographer, who took pictures of the putitive lynching;

MAJOR DORSEY WATSON;

GUS ARZBERGER, one of the parties identified as a member of the posse who roped the petitioner defendant Arthur Thomas and who, at the time of the trial, refused to testify, claiming immunity under the Fifth Amendment of the United States Constitution;

ROBERT E. MACOMB, accused of being one of the parties who roped the petitioner;

[fol. 11] ARTHUR THOMAS, the petitioner himself, to give testimony and to be subjected to cross-examination;

MR. HAYZEL DANIELS, co-counsel for the defendant in the original trial;

MR. BURT TOMLINSON and MR. ALBERT TOMLINSON, Bisbee attorneys, co-counsel for the defendant in the original trial;

MR. PERCY BOWDEN, Chief of Police, City of Douglas, Arizona.

Petitioner further moves that the Court authorize the Clerk of Court to issue subpoenas to order witnesses to appear, upon the request of either the State of Arizona or the Petitioner herein; and, further, that the Court issue its Order, ordering the Warden of the State Penitentiary of Arizona to make the defendant Arthur Thomas, petitioner herein, available for said hearing in order to testify therein.

DATED this 8th day of March, 1956.

/s/ EDWARD MORGAN
EDWARD MORGAN
180 North Church
Tucson, Arizona
Attorney for Petitioner

[fol. 12] • • • •

[fol. 13] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Phoenix Division
(Title Omitted)

AMENDED PETITION FOR WRIT OF HABEAS CORPUS—
Filed March 9, 1956

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

EDWARD MORGAN, being first duly sworn, upon his oath deposes and states:

That he has been the attorney of record for the defendant Arthur Thomas in all matters and proceedings herein and in the State courts of Arizona; that in supplement to the original petition for writ of habeas corpus filed herein, said Edward Morgan, for and on behalf of Arthur Thomas, further petitions the Court to issue its Writ of Habeas Corpus for the reason and on the grounds that the Constitutional rights of the defendant were violated at the time of his trial in the State court on the charge of first degree murder, in that the evidence would indicate that the committing magistrate in that case, Justice Frazier, failed to advise the defendant of his Constitutional rights of obtaining counsel. This issue was ruled upon by the trial Court; was raised in a motion for new trial and denied; was presented as a proposition on appeal to the State Supreme Court and denied therein.

That the defendant petitioner has exhausted all of his other remedies and therefore petitions this Court that it grant a Writ of Habeas Corpus to the defendant Arthur [fol. 14] Thomas, upon the foregoing additional grounds.

/s/ EDWARD MORGAN

Subscribed and sworn to before me this 8th day of March, 1956.

/s/ ABE KASTEL
Notary Public

My commission expires:
January 19, 1959.

AFFIDAVIT OF SERVICE—(Omitted in Printing)

[fol. 15] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Phoenix Division

(Title Omitted)

AFFIDAVIT IN SUPPORT OF AMENDED PETITION FOR WRIT OF HABEAS CORPUS—Filed March 9, 1956

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

EDWARD MORGAN, being first duly sworn, upon oath deposes and says:

That, to the best of his knowledge and in accordance with the statement of evidence filed in petitioner's original brief on appeal to the Supreme Court of the State of Arizona, and referring thereto, page 39, it is set forth as follows:

> "On the first cross-examination of L. T. Frazier by the defense, the following took place:"

(Inasmuch as the defense counsel were without funds to produce another copy of the Transcript of evidence in the original trial, to submit to the United States Supreme Court with their petition for Writ of Certiorari, the defense exchanged several of its volumes with the Attorney General's office, State of Arizona, in order to get the neatest set of the transcript, and forwarded the full transcript to the United States Supreme Court, replacing the Attorney General's copy with volumes from the defendant's set. The net result is that the defendant and his counsel are now without a copy of the transcript of record and must therefore rely upon material which they have heretofore quoted in their briefs and petitions and the accuracy of 1: the original quotations and 2: the copy work made of said original petitions and briefs. The following is therefore quoted from defendant's copy of his brief to the [fol. 16] State Supreme Court, and we continue to quote therefrom. The references are to the pages in the tran-

script of the testimony in the original trial in the State Court.)

> "'P. 1887 T. 1, 19, Q. —"And you at no time told him (the defendant) that he was entitled to an attorney in your Court?" 1, 21, A. —"No."

"It must be pointed out that the County Attorney at this time did not attempt any redirect of the witness and left the statement by the witness Frazier as it was. It was only after Mr. Tomlinson, one of the attorneys for the defense, made his motion:

> P. 1888 T. 1 3, "Mr. Tomlinson:
> Your Honor, at this time we move to strike and expunge the testimony of Judge L. T. Frazier from the record on the grounds that his (the defendant's) constitutional rights, both national and state, have been violated on the grounds of he was not advised by the Justice Court that he could have an attorney to represent him."
> 1 15, "The Court: I will reserve ruling."

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"And later, before any further testimony by Judge Frazier the Court overruled the objection, (p. 2072 T. 1. 18 and p. 2073 T. 1. 1) and after a recess during which time the County Attorney discussed with Judge Frazier his testimony (see p. 2083 T, 1. 25, 26 and p. 2084, 1. 1 et seq.) that the witness attempted to correct his testimony by saying that he *must* have informed the defendant of his rights, including the right to counsel. (See ACA—44-302).

"The Court should take into consideration the fact that Judge Frazier attempted to take the part of a prosecutor and interrogated the defendant.

> P. 2083 T., 1. 4, Q. —(Defense Counsel Tomlinson): "And you didn't ask him if he killed the woman? 1. 6, A. —(Judge L. T. Frazier): "After I read the complaint to him (the defendant) and he stated that he was guilty, that he did kill the woman, I asked him if he killed

her with an ax. He said 'No, I killed her with a knife.'"

1. 10, Q. —"How come you to ask him if he killed her with an ax?"

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1. 12, A. —"Because I had been told her head was pretty badly crushed."
1. 14, Q. —"I see. And that is what prompted you to put him on examination and ask him if he had killed her with an ax?"
1. 17, A. —"That is right."

"Thus in effect the defendant was denied a preliminary examination and his so-called verbal waiver should be set aside as invalidated by the failure of the magistrate to inform the defendant of his right to counsel and under the rule of *State* v. *Hood*, 69 Ariz. 294, 157 P (2d) 698, the same is a denial of a due process under Art. 2, Sec. 30 of the Arizona constitution and Art. 14 of the Amendments to [fol. 17] "the U. S. Constitution. (Though *State* v. *Hood*, Supra, held there to be a waiver in that case because, as in that case, as differentiated from this, there was no direct evidence in the record that the judge failed to instruct the defendant of his right to counsel or in general.)

"This Negro farm-hand can hardly be said to know, understand and appreciate his con-

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stitutional rights. He is further handicapped by the insufficient and confused explanation of the magistrate, by the presence of the Sheriff whom he was in fear of, and by the complete surrounding of unfriendly white officials. It is not too inconceivable to the reasonable mind that he would state anything to prevent harm coming to him. It is not apparent, further, from the record, whether the magistrate warned him that he need not make any statement, but that if he did make a statement such statements would be used against him in the trial of the offense.

"The Rules of Criminal Procedure, Sec. 47, provides as follows:

> "'STATEMENT BY DEFENDANT—When the examination of the witnesses for the state is closed, the magistrate shall inform the defendant that he may make a statement, not under oath, regarding the charge against him; that he is accorded this right in order to enable him, if he sees fit, to answer the charge and to explain the facts appearing against him, that he may refuse to make any statement, and that such refusal may not be used

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> against him at the trial, but that if he makes such statement, whatever he says therein may be given in evidence against him at the trial."'

"The object of giving such caution or warning is twofold: To inform him that his statements will be used against him, hence what he says will be free and voluntary, and to prevent the proceedings from becoming an inquisition. *Maki* v. *State*, 18 Wyo. 481, 112 p. 334, *Wood* v. *U. S.*, (128 F 2d 265; 141 ALR 1318).

"In the case of judicial confessions, where a statute provides that caution must be given, it must appear that such warning was given before a confession is admissible.

22 *CJS* Criminal Law, Sec. 822

"In *State* v. *Cross*, 142 Tenn. 510, 221 SW 489, p. ALR 1354, it was held that the committing magistrate could not testify that one brought before him on a murder charge pleaded guilty, if he did not follow the statutory mandate requiring him to inform the defendant as to his right to counsel, and that any statements which he might make will be used against him on the trial of the matter. Where an

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accused is without counsel upon a preliminary hearing to determine whether he should be held and it

[fol. 18] does not appear "that his constitutional rights have been safeguarded, his statements of guilt cannot be received in evidence against him. Before he speaks, the fair and equitable practice is that the Court should advise him of his rights to counsel and to inform him that if he makes a statement it will be used against him. *Woods* v. *U. S.*, Supra. While warning may not be decisive or important, alone, it is a circumstance to be noted in passing upon the admissibility of the confession, where a magistrate does not follow the statutory requirements in advising the accused of his right to counsel and his peril if he makes a statement. Where circumstances are unusual, it may not be assumed that the accused appreciated his constitutional rights.

"*Haley* v. *Ohio*, 332 U.S. 596, 92 L. ed.

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"It is error not to allow the defense an opportunity to show that all of the confessions obtained were voluntary. *White* v. *State*, 24 ALR 699

"In the instant case, the Court did not permit defendant an opportunity to show that at the time he made the statements to Judge Frazier his mind was not free from fear. (See p. 2091-2098 T.) This was a fear which began on the afternoon of March 17, 1953, at the scene of the arrest. At that time and place, defendant was threatened with hanging, if he did not tell the sheriff Jack Howard, and other deputies, who killed the victim. This fear was further increased by the action of the sheriff in taking the two Negro arrestees to view the body of the dead woman at the mortuary, and further all during the time the defendant was out of jail he was in the custody of Sheriff Howard.

"It may also be noted that the Court ruled on two subsequent confessions which it

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concluded was induced by fear. It is not understood how the Court arrived at the conclusion that the

confession made before Judge Frazier was free and voluntary, when the defendant was not permitted to show its involuntariness." . . . . . .

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/s/ EDWARD MORGAN
EDWARD MORGAN
180 North Church
Tucson, Arizona
Attorney for Petitioner

Subscribed and sworn to before me this 8th day of March, 1956.

/s/ ABE KASTEL
ABE KASTEL
Notary Public

My commission expires:
January 19, 1959.

[fol. 18a] (File Endorsement Omitted)

[fol. 19] IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
Phoenix Division
(Title Omitted)

MEMORANDUM AND AFFIDAVIT IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS AND MOTION
March 9, 1956

COMES NOW The Attorney General of the State of Arizona and presents the following authorities and argument in opposition to the petition and motion herein.

"So far as weight to be given the proceedings in the courts of the state is concerned, a United States District Court, with its familiarity with state practice is in a favorable position to recognize adequate state grounds in denials of relief by state courts without opinion. A fortiori, where the state action was based on an adequate state ground, no further examination is required, unless no state remedy for the deprivation of federal constitutional rights ever existed."

Brown v. *Allen*, 344 U.S. 443.

The State of Arizona contends that this language of *Brown* v. *Allen* is applicable here, in that the State action was based on an adequate State ground thoroughly set forth in the opinion of the Arizona Supreme Court in *State* v. *Thomas*, 275 P. 2d 408, 78 Ariz. 52. Since there is, under Arizona law, a state remedy for the deprivation of federal constitutional rights, and since the State action was based on adequate ground, we respectfully submit that no further examination by the federal district court is required.

In addition, *Brown* v. *Allen*, supra, further states:

> "Furthermore, where there is material conflict of fact in the transcripts of evidence as to deprivation of constitutional rights, the district court may properly depend upon the state's resolution of the issue."

[fol. 20] While the State does not admit that there is such material conflict in the evidence in this case, under the cited language if there were such conflict this Court may properly depend upon the State's resolution of the issue.

Brown v. *Allen*, supra, further states:

> "Applications to district courts on grounds determined adversely to the applicant by state courts should follow the same principle—a refusal of the writ without more, if the court is satisfied by the record, that the state process has given fair consideration to the issues and the offered evidence, and has resulted in a satisfactory conclusion. Where the record of the application affords an adequate opportunity to weigh the sufficiency of the allegations and the evidence, and no unusual circumstances calling for a hearing are presented, a repetition of the trial is not required."

The State respectfully submits that the record in this matter is sufficient to afford an adequate opportunity to weigh the sufficiency of the allegation of the evidence. The State has submitted to this Court the entire transcript of testimony of the original trial of *State* v. *Thomas* held in the Superior Court, Cochise County,

Arizona. In addition, the State submits, herewith, all briefs filed in this matter by the petitioner and the State of Arizona before the Arizona Supreme Court and the United States Supreme Court.

The State of Arizona, therefore, opposes petitioner's motion for a further hearing for the purpose of presenting witnesses in this matter.

The State of Arizona contends that the rule stated in *Brown* v. *Allen*, supra, "When the facts admitted by the state show coercion . . . a conviction will be set aside as violative of due process." is not applicable to this case because upon the record no coercion was shown in the facts admitted by the State.

In the case of *Stein* v. *New York*, 346 U.S. 156, the Court said:

> "It is common courtroom knowledge that extortion of confessions by 'third-degree' methods is charged falsely as well as denied falsely. The practical problem is to separate the true from the false. Primarily, and in most cases final, responsibility for determining contested facts rests, and must rest, [fol. 21] upon state trial and appellate courts. A jury and the trial judge—knowing local conditions, close to the scene of events, hearing and observing the witnesses and parties—have the same undeniable advantages over any appellate tribunal in determining the charge of coercion of a confession as in determining the main charge of guilt of the crime. When the issue has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded, we will accord to the state's own decision great and, in the absence of impeachment by conceded facts, decisive respect."

The Stein case, which arose in the State of New York, involved an alleged coerced confession. It is significant in that the law of the State of New York is almost identical with the law of the State of Arizona with respect to the admission of confessions and a determination of their voluntariness. The Arizona law on the subject is fully set forth on Page 65 of Appellant's Brief in

the Supreme Court of the State of Arizona, Case No. 1045. In the Stein case the Court said that if the evidence is conflicting as to whether or not the confession was coerced, and if the trial court has submitted such question to the jury under proper instructions, and if there is sufficient evidence without the consideration of the confession, the federal court should not disturb the judgment.

"Against this factual background, we do not think our cases establish that to submit a confession to a state jury for judgment of the coercion issue automatically disqualifies it from finding a conviction on other sufficient evidence, if it rejects the confession. Here the evidence of guilt, consisting of direct testimony of the surviving victim, Waterbury, and the well-corroborated accomplice, Dorfman, as well as incriminating circumstances unexplained, is enough apart from the confessions so that it could not be held constitutionally or legally insufficient to warrant the jury verdict. Indeed, if the confession had been omitted and the convictions rested on the other evidence alone, we would find no grounds to review, not to mention to reverse them.

We would have a different question if the procedure had been that which may have been in mind when some of our cases were written. Of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as a part of the evidence to be considered on the issue of guilt and the ruling admitting the confession is found on review to be erroneous, the conviction, at [fol. 22] least normally, should fall with the confession.

But here the confessions are put before the jury only tentatively, subject to its judgment as to voluntariness and with binding instructions that they be rejected and ignored unless found beyond reasonable doubt to have been voluntary. By petitioners' hypothesis on this point, the jury itself rejected the confessions. The ample other evidence makes this

a possible, if not very convincing, explanation of the verdict. By the very assumption, however, there has been no error, for the confessions finally were rejected as the free choice of the jury.

We could hold that such provisional and contingent presentation of the confessions precludes a verdict on the other sufficient evidence after they are rejected only if we deemed the Fourteenth Amendment to enact a rigid exclusionary rule of evidence rather than a guarantee against conviction on inherently untrustworthy evidence. We have refused to hold it to enact an exclusionary rule in the case of other illegally obtained evidence."

Stein v. *New York*, 97 L. Ed. 1522 (346 U.S. 156; 73 S. Ct. 1077)

As an ironclad indication that the events surrounding the arrest of the defendant did not force or coerce him into making the confession to Judge Frazier, the State points to the fact that on the preceding evening he made a statement to the County Attorney in which he denied the killing. (See statement taken at County Attorney's home on March 17, 1953, at 7:00 P.M., attached hereto).

Further, he denied the killing even at the time the arrest was made when the purported threats of hanging were made.

The first time he admitted guilt was in the calm atmosphere and sanctity of open court. If he was in a state of fear at that time, it was from something that happened between 7:00 o'clock the previous evening when he denied guilt and 11:00 o'clock the next morning when he admitted guilt to Judge Frazier. He doesn't contend that anything of that nature did occur during that period. He was advised the previous evening by the County Attorney that no promises of leniency were being given and no threats were being made. (See attached).

[fol. 23] In conclusion, the State believes the language of *Stein vs. New York*, supra, is applicable to the petition and motion herein:

"We are not willing to discredit constitutional doctrines for protection of the innocent by making

of them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the State are also entitled to due process of law."

Respectfully submitted,

ROBERT MORRISON
The Attorney General

/s/ JAMES H. GREEN, JR.
JAMES H. GREEN, JR.
Special Assistant Attorney General
108 Capitol Building
Phoenix, Arizona

/s/ WES POLLEY
WES POLLEY
Cochise County Attorney
Attorneys for Respondent.

Copies mailed this 9th day of
March, 1956, to Edward W. Morgan,
180 North Church, Tucson, Arizona,
Attorney for Petitioner.

[fol. 24]

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

AFFIDAVIT

WES POLLEY, the affiant, after being duly sworn deposes and says:

That he is the duly elected, qualified and acting county attorney of Cochise County, State of Arizona, and was during the month of March, 1953; that during that month he was confined to his home in a hospital bed by virtue of being in a full length body cast, due to an injury; that at approximately seven o'clock P.M. on March 17, 1953, the defendant was brought to his home, by the

sheriff and one or more deputy sheriffs, for questioning; this was approximately three or four hours after the defendant was arrested and taken into custody near Willcox, Arizona; the intervening time had been spent by the sheriff taking the defendant to Willcox in search of a magistrate; upon a court reporter being called to the home of the county attorney, the statement of the defendant was taken beginning at seven o'clock P.M.; the defendant was told by the county attorney "I want to ask you about this occurrence over in Kansas settlement; I am not going to make you any promises if you do talk to me and I am not going to make you any threats if you don't talk to me; whatever I ask you I want you to tell me freely and I want you to tell me [fol. 25] the truth." After being so advised the defendant freely answered questions which amounted to a continuous denial of any personal guilt in connection with the death of Mrs. Miskovich. The defendant explained how the killing took place, but accused a young negro boy named Ross Lee Cooper as being the killer.

DATED this 9th day of March, 1956.

/s/ WES POLLEY
Affiant

Subscribed and sworn to before me this 9th day of March, 1956.

/s/ ORALIA M. RAJAS
Notary Public

My Commission expires:
September 23, 1956.
Copy of the foregoing Affidavit
mailed this 9th day of March, 1956,

to: EDWARD MORGAN, 180 Church St., (North)
Tucson, Arizona
Attorney for Petitioner.

* * * * *

[fol. 27] MINUTE ENTRY OF ARGUMENT AND SUBMISSION—May 18, 1956—(Omitted in printing)

[fol. 29] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,098

ARTHUR THOMAS, *Appellant*,

vs.

FRANK EYMAN, Superintendent of the State Prison of Arizona, *Appellee*.

Appeal from the United States District Court for the District of Arizona.

Before: MATHEWS, POPE and LEMMON, Circuit Judges.

OPINION—August 8, 1956

MATHEWS, Circuit Judge:

On March 16 or 17, 1953, Janie Miskovich was murdered in Cochise County, Arizona. Thereafter, on March 17, 1953, her body was found, an investigation was made, and appellant, Arthur Thomas, was arrested in Cochise County by Jack Howard, sheriff of that county. On March 18, 1953, the sheriff took appellant before a magistrate—L. T. Frazier, a justice of the peace in Cochise County—for preliminary examination; appellant waived such examination; the magistrate held appellant to answer to the Superior Court of the State of Arizona in and for Cochise County and fixed his bail at $25,000; and, appellant having failed to furnish bail, the magistrate committed him to the custody of the sheriff. [1]

Thereafter, in the Superior Court, an information was filed charging appellant with the murder.[2] Appellant was [fol. 30] arraigned, pleaded not guilty and had a jury trial. The trial began on June 1, 1953, and ended on June 19,

[1] See Rules 35, 39, 40 and 55 of the Arizona Rules of Criminal Procedure, A.C.A. (Arizona Code Annotated) 1939, §§ 44-140, 44-302, 44-303 and 44-322.

[2] See Rules 112 and 114 of the Arizona Rules of Criminal Procedure, A.C.A. 1939, §§ 44-501 and 44-503.

1953, when the jury returned a verdict finding appellant guilty of first-degree murder and fixing his punishment at death.[3] Appellant moved for a new trial. The motion was denied on June 26, 1952. Thereupon, on June 26, 1953, the Superior Court rendered judgment on the verdict, sentenced appellant to death and issued a warrant directing the sheriff to deliver appellant to the superintendent of the State prison of Arizona for execution.[4] The sheriff did so deliver appellant on or before July 6, 1953. At all times thereafter, appellant was a prisoner in the superintendent's custody pursuant to the Superior Court's judgment.

Appellant appealed from the Superior Court's judgment to the Supreme Court of the State of Arizona, hereafter called the Arizona Supreme Court. The Arizona Supreme Court affirmed the Superior Court's judgment on October 18, 1954.[5] Appellant moved the Arizona Supreme Court for a rehearing. The Arizona Supreme Court denied that motion on November 16, 1954. On December 2, 1954, appellant filed in the Superior Court a second motion for a new trial.[6] The Superior Court made an order denying that motion on December 18, 1954. Appellant appealed from that order to the Arizona Supreme Court. The Arizona Supreme Court affirmed that order on June 28, 1955.[7] Appellant petitioned for certiorari to review both decisions of the Arizona Supreme Court—the decision affirming the Superior Court's judgment[8] and the decision affirming the Superior Court's

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[3] See A.C.A. 1939, § 43-2903.

[4] See Revised Code of Arizona 1928 § 5119; Conway v. Arizona, 60 Ariz. 69, 131 P. 2d 983.

[5] State v. Thomas, 78 Ariz. 52, 275 P. 2d 408.

[6] The motion of December 2, 1954, was or purported to be a motion for a new trial on the ground of newly discovered evidence. See Rules 355 and 357(c) of the Arizona Rules of Criminal Procedure, A.C.A. 1939, §§ 44-2002 and 44-2004(c).

[7] State v. Thomas, 79 Ariz. 158, 285 P. 2d 612.

[8] State v. Thomas, 78 Ariz. 52, 275 P. 2d 408.

order denying appellant's second motion for a new trial.[9] Certiorari was denied on January 16, 1956.[10]

[fol. 31] Thereafter, in the United States District Court for the District of Arizona, W. Edward Morgan, acting in behalf of appellant,[11] filed two applications[12] — one on March 1, 1956, and one on March 9, 1956—each praying for a writ of habeas corpus directed to appellee, Frank Eyman, who, on March 1, 1956, and at all times thereafter, was superintendent of the State prison of Arizona.[13]

The District Court did not at any time grant appellant a writ of habeas corpus or issue an order directing appellee to show cause why such a writ should not be granted,[14] nor did it hold a plenary hearing on the applications. However, appellee's counsel appeared before the District Court and, on March 9, 1956, filed with the District Court a transcript[15] of all proceedings had and all testimony taken in the Superior Court[16] and copies of all briefs filed in the Arizona Supreme Court on appellant's appeal from the Superior Court's judgment. Having considered the applications, the transcript, the briefs and the Arizona Supreme Court's decision affirming the Superior Court's judgment,[17] the District Court, on March 13, 1956,

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[9] State v. Thomas, 79 Ariz. 158, 285 P. 2d 612.

[10] Thomas v. Arizona, 350 U.S. 950.

[11] W. Edward Morgan, Hayzel B. Daniels and I. B. Tomlinson were counsel for appellant in the Superior Court and in the Arizona Supreme Court.

[12] Each application consisted of an affidavit made and signed by Morgan. Appellant did not sign or verify either of them. The first application was entitled "Petition for writ of habeas corpus." The second application was entitled "Amended petition for writ of habeas corpus."

[13] In the applications, appellee was called a warden, and the State prison was called a penitentiary.

[14] See the first paragraph of 28 U.S.C.A. § 2243.

[15] The transcript was in eight volumes (2,616 pages). It was part of the record on appellant's appeal from the Superior Court's judgment and is part of the record here.

[16] See 28 U.S.C.A. § 2247.

[17] State v. Thomas, 78 Ariz. 52, 275 P. 2d 408.

entered an order denying the applications. From that order appellant has appealed.

Appellant contends that the District Court erred in denying the applications without granting a writ of habeas corpus or issuing an order to show cause and without a plenary hearing.

Appellant being a State prisoner, the District Court could not properly grant him a writ of habeas corpus [fol. 32] unless it appeared that he was in custody in violation of the Constitution of the United States.[18]

In determining whether appellant was entitled to a writ of habeas corpus, it was proper for the District Court to consider—as it did—the transcript of proceedings had and testimony taken at appellant's trial, the briefs filed on appellant's appeal from the Superior Court's judgment and the Arizona Supreme Court's decision affirming that judgment, as well as the applications.[19]

The first application—the one filed on March 1, 1956—stated that "on the date of apprehension,[20] [appellant] was roped and putitively [sic] lynched in the presence of Jack Howard, the then sheriff of [Cochise County];" that "subsequent to said roping, and while under fear and coercion, [appellant] made * * * confessions of commission of the crime;"[21] and that "one of said confessions, over the objection of counsel,[22] was admitted into evidence,[23] * * * in violation of the Fourteenth Amendment to the United States Constitution."

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[18] See 28 U.S.C.A. § 2241(c); Brown v. Allen, 344 U.S. 433.

[19] Brown v. Allen, supra; Boyden v. Webb, 9 Cir., 208 F. 2d 203. See also Schell v. Eidson, 8 Cir., 203 F. 2d 902; United States ex rel. Gawron v. Ragen, 7 Cir., 211 F. 2d 902; United States ex rel. O'Connell v. Ragen, 7 Cir., 212 F. 2d 272; Ferguson v. Manning, 4 Cir., 216 F. 2d 188; Bailey v. Smyth, 4 Cir., 220 F. 2d 954.

[20] Meaning, we suppose, the date of appellant's arrest—March 17, 1953.

[21] Meaning, we suppose, the crime of murdering Janie Miscovich.

[22] See footnote 11.

[23] Meaning, we suppose, that the confession was admitted into evidence at appellant's trial.

Liberally construed, these statements may be taken to mean that an involuntary confession of appellant was admitted into evidence at his trial in violation of the Fourteenth Amendment. Thus the first application may be deemed to have raised a Federal constitutional issue, namely, whether the Fourteenth Amendment was so violated. No other Federal constitutional issue was raised in or by either of the applications.

The transcript showed the following facts:

The only "confession" admitted into evidence at appellant's trial was an oral statement made by him on March [fol. 33] 18, 1953, when he was taken before the magistrate (L. T. Frazier) for preliminary examination. That statement, hereafter called the confession, was admitted into evidence by the admission of the magistrate's testimony concerning it. That testimony was as follows:

"He [appellant] was there on the charge of murder. I read the complaint to him and told him that he had a right to a preliminary hearing in the justice court,[24] or he might waive that right and have his hearing in the Superior Court. I told him he had the right to employ an attorney to assist him in preparing his case, and that he would be allowed a reasonable length of time for the preliminary hearing, and he said, 'I don't need any lawyer. I am guilty. I killed the woman.'"[25]

Prior to the admission of the above quoted testimony, evidence was presented in the absence of the jury on the issue of the voluntariness of the confession, and, as a preliminary matter, the Superior Court held that it was voluntary.[26] Thereafter evidence on the issue of voluntariness was presented to the jury, the above quoted

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[24] Meaning, obviously, a preliminary hearing before the magistrate, the magistrate being, in this case, a justice of the peace.

[25] The above quoted testimony of the magistrate was given on his direct examination. On cross-examination by appellant's counsel, the magistrate testified: "After I read the complaint to him and he stated that he was guilty, that he did kill the woman, I asked him if he killed her with an ax. He said, 'No. I killed her with a knife.'"

[26] This holding was announced in the absence of the jury.

testimony was admitted, and the issue of voluntariness was submitted to the jury with appropriate instructions.[27]

On his appeal from the Superior Court's judgment, appellant assigned as error the admission of the above quoted testimony, his contention[28] being that its admission violated the Fourteenth Amendment, (1) in that the confession shown by the testimony was a plea of guilty which he had entered when taken before the magistrate for preliminary examination and had withdrawn by pleading not guilty in the Superior Court; and (2) in that the confession was involuntary.

Rejecting appellant's contention, the Arizona Supreme Court held that the confession was not a plea of guilty, there being in Arizona no such thing as an arraignment

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[27] The instructions on this issue were as follows:

"The State has introduced in evidence before you certain statements claimed to have been made by the defendant [appellant] after his arrest and while he was in the custody of the officers of the law, which statements are relied on in part by the State to establish the guilt of the defendant of the offense charged, and you are instructed, ladies and gentlemen of the jury, that confessions and statements made by one charged with an offense must be carefully scrutinized and received with great caution; yet, when they are made voluntarily and deliberately, such confessions and statements may be considered as evidence for and against the person making them, the same as any other evidence, but if a confession or statement is made by one in custody under such circumstances as show he was induced to make the same by punishment, intimidation or threats on the part of the persons who had him in charge, or that show that the confessions and statements were not freely and voluntarily made, then they cannot be considered as evidence against the person making them.

"In this case if you do not find that the confessions and statements by the defendant while in custody were freely and voluntarily made and made without punishment, intimidation or threats on the part of the persons having the defendant in custody, then you must disregard such statements or confessions as affording any evidence against the defendant whatsoever.

"I further instruct you that you may consider prior acts of intimidation, threats or punishment to the defendant, if made, in considering whether or not a confession made at a later time is voluntary or involuntary."

[28] This appeared from the brief filed by appellant on his appeal from the Superior Court's judgment.

or a plea of guilty or not guilty in a preliminary examination; that the above quoted testimony was properly admitted; and that the issue of the voluntariness of the confession was properly submitted to the jury.[29]

Thus the Arizona Supreme Court determined adversely to appellant the only Federal constitutional issue raised in the habeas corpus proceeding. The District Court accepted that determination as correct. Hence the District Court was not required to grant a writ of habeas corpus or to issue a show cause order or to hold a plenary hearing.[30]

Order affirmed.

POPE, Circuit Judge:

I concur. What convinces me that the court below did not err in exercising its discretion to accept the State court's resolution of the fact issues involved is the admirable manner in which the State trial judge dealt with what the Arizona Supreme Court called the "unsavory incidents" which attended petitioner's apprehension and arrest.

It is apparent that the trial judge believed the testimony of a State Highway patrolman that the county sheriff not only stood by while petitioner and another prisoner in his custody were roped about the neck and dragged by mounted members of a mob, but that he even said to petitioner "Will you tell the truth, or I will let them go ahead and do this," or "I will go ahead and let them use this."[1]

By a ruling which, it must be conceded, was in accordance with the highest traditions of the bench, the trial judge held that the effects of this misconduct on the part of the sheriff were such that a confession taken from Thomas the following day by the county attorney, and a confession taken two days later at the county attorney's

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[29] State v. Thomas, 78 Ariz. 52, 275 P. 2d 408.

[30] See cases cited in footnote 19.

[1] See the Arizona Supreme Court decision, State v. Thomas, ... Ariz. ....., 275 P. 2d 408 at p. 418.

office, must both be rejected and excluded as coerced and involuntary. It was prior to the taking of either of these rejected confessions that Thomas was taken before the magistrate where he admitted his guilt. The argument is, that if Thomas was so terrorized by the officially condoned threats of lynching that his later confession in the county attorney's office could not be voluntary, then his statement to the magistrate, which followed even more closely the lynching threats, must likewise be taken to have been received when he was under the same psychological coercion, particularly in view of the fact that he was then without counsel, and only the same sheriff, and one of his deputies was present aside from the court officials.

More precisely, the contention is that the federal court should have taken testimony and itself examined into this fact question, and in connection therewith have permitted the petitioner to give his testimony. For reasons which satisfied them counsel for petitioner did not put him on the stand at the preliminary inquiry, in the absence of the jury, into the circumstances of the confession. This failure to use his testimony is something of which petitioner cannot complain here.[2] It is complained that at the time of this preliminary ruling defense counsel did not know that the highway patrolman's chief had forbidden him to talk to them, and did not know that his testimony would show these "unsavory incidents", and hence the trial judge was not informed of this when he admitted the magistrate's testimony.[3] But after the preliminary admission of this confession, the whole question as to whether it was voluntary was submitted to the jury by instructions as to which no fault is found, and the

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[2] "A failure to use a state's available remedy, in the absence of some interference or incapacity . . . bars federal habeas corpus." Brown v. Allen, 344 U.S. 443, 487.

[3] Appellant asserts that the trial judge later stated that had he heard the patrolman's story before he ruled, he would have excluded this confession. Appellee says the record does not show any such thing. Appellant supplies no transcript references and we are unable to find anything to this effect in the record.

jury of course heard the patrolman's testimony, and its verdict resolved the question. Also, the trial judge later denied a new trial.

I am not only unable to perceive any respect in which the State trial judge failed to afford petitioner due process in respect to a determination of the question of whether this confession was coerced. Those best able to judge of this question of fact, the judge and the jury, dealt with it in a manner which shows no vital flaw. With the demonstrated strict regard which the trial judge obviously had for the protection of petitioner's constitutional rights, I see no reason why the court below should not accept his and the jury's determination.

(File endorsement omitted.)

[fol. 37] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15098

ARTHUR THOMAS, *Appellant*,
vs.
FRANK EYMAN, Superintendent of the State Prison of Arizona, *Appellee*.

JUDGMENT—Filed and Entered, August 8, 1956

Apeal from the United States District Court for the District of Arizona.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Order of the said District Court in this cause be, and hereby is affirmed.

(File endorsement omitted.)

[fol. 38] IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—September 12, 1956

On consideration thereof, and by direction of the Court,

IT IS ORDERED that the petition of Appellant, filed September 10, 1956, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

[fol. 39] • • • •

[fol. 40] SUPREME COURT OF THE UNITED STATES

(Title omitted)

On petition for writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR WRIT OF CERTIORARI—

March 4, 1957

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 812.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though file in response to such writ.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 88

ARTHUR THOMAS,

Petitioner,

vs.

STATE OF ARIZONA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITIONER'S OPENING BRIEF

W. EDWARD MORGAN,
73 West Council,
Tucson, Arizona,
Counsel for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 88

ARTHUR THOMAS,

Petitioner,

vs.

STATE OF ARIZONA.

PETITIONER'S OPENING BRIEF

COMES NOW the Petitioner, ARTHUR THOMAS, by his Counsel, W. EDWARD MORGAN, and hereby sets forth his Brief:

(a)

Reference to Official Reports of Opinions Delivered in the Courts Below

State of Arizona v. *Arthur Thomas,* 78 Ariz. 52, 275 P.2d 408;

State of Arizona v. *Arthur Thomas,* 79 Ariz. 158, 285 P.2d 612;

In the Matter of the Application of Arthur Thomas for a Writ of Habeas Corpus, United States District Court for the District of Arizona, Unofficial Report Minute Entry, Denial of Application March 13, 1956;

Arthur Thomas, Appellant v. Frank Eyman, Superintendent of the State Prison of Arizona, Appellee, 235 Fed. 2d 775.

(b)

Statement of Grounds of Jurisdiction of the Supreme Court of the United States

In the Matter of the Application of Arthur Thomas for Writ of Habeas Corpus before the United States District Court for the District of Arizona, application denied March 13, 1956. Appeal was duly made to the United States Circuit Court of Appeals for the Ninth Circuit, known as *Arthur Thomas, Appellant* v. *Frank Eyman, Superintendent of the State Prison of Arizona, Appellee*, Case. No. 15,098. Appeal denied and District Court affirmed August 8, 1956. Motion for Rehearing filed submitted. September 11, 1956, Motion for Rehearing denied.

The statutory provisions which confer on this Court jurisdiction to review the judgments and decrees in question by Writ of Certiorari are: 28 U.S.C. 2101.

(c)

Pertinent Constitutional Provisions

Article 5

United States Constitution — Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled

in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

ARTICLE 14

United States Constitution — Amendment

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(d)

The Questions Presented for Review

1. Whether or not the Defendant's Constitutional rights as guaranteed by the United States Constitution, and in particular Article 5 thereof and the Fourteenth Amendment thereto, granting to the Defendant the right of trial in conformity with due process, were denied by the State Court by reason of allowing into evidence a confession obtained by fear, duress and coercion.

2. Whether or not the United States District Court erred in denying the application of the appellant without granting a Writ of Habeas Corpus or issuing an Order to Show Cause; and without ordering a plenary hearing, when a question of fact was presented by the application going to the question of whether or not the Defendant's Constitutional rights under Article 5 and Amendment 14 thereto

had been violated in the procedures of his case before the State Courts.

(e)

A Concise Statement of the Case

The Appellant herein was accused of the commission of the crime of murder.

The Defendant was placed on trial June 1, 1953, in the State Court. During the course of that trial, the Defendant objected and his objection was overruled, to testimony of the State's witness L. T. Frazier as to a purported confession made by the Defendant. Defendant's objections were that the confession was involuntary and obtained by coercion and fear and therefore inadmissible under Articles 5 and 14 of the U. S. Constitution. The objection was overruled; testimony was admitted; and on June 19, 1953, the Defendant was found guilty on the charge of first degree murder and sentenced subsequently to death. The Defendant is still in custody pending execution of the sentence.

The case was appealed to the Supreme Court of the State of Arizona and the issue of the inadmissibility of the confession and the violation of the Defendant's rights, both State and Federal, were raised on appeal and determined adversely to the Defendant as reported in the Arizona case known as *State of Arizona* v. *Arthur Thomas,* 78 Ariz. 52, 257 P.2d 408.

Subsequently, the Appellant herein petitioned the United States Supreme Court for Writ of Certiorari, which Writ was denied without ruling.

On March 1 and March 9, 1956, W. Edward Morgan, acting in behalf of the Appellant, filed two applications for Writ of Habeas Corpus, C.R. 1 and R. 5, R. 7, setting forth

that the Appellant, Arthur Thomas, wished to give testimony in person to the Court showing that he had been coerced and that as a result of this coercion the confession which was admitted into evidence in the Trial Court was obtained in violation of the Federal Constitutional rights of the Defendant and that the introduction of the evidence over his objection was therefore error and a violation of due process; that, further, Appellant wished to introduce evidence which would indicate and show that an officer of the State of Arizona, to-wit: the head of the State Highway Patrol Department, by administrative order, kept a key witness to the acts of coercion, to-wit: Harry Selchow, an Arizona Highway Patrolman, from informing the Defendant or his Counsel of what his testimony would be if called as a witness; that Appellant, in his application, alleged that because he did not know the testimony of this important witness prior to the time he placed him on the stand and because of the fact that the witness refused to talk to either the Defendant or his Counsel prior to the time of answering questions at the time of the trial in chief, the Defendant was denied by an act of an officer of the State the ability to properly prepare his case and was therefore denied due process. The Appellant, through his Counsel, was informed that there was another witness who was an employee of the State, a member of the State Highway Patrol who was a witness to the putative lynching of the Appellant Arthur Thomas; that again the Appellant did not even call said witness, for the reason that he did not know that the party was a witness to the lynching and therefore did not know what he could testify to.

It was these matters which by Petitioner's application for Writ of Habeas Corpus he wished to raise before the Federal Court. Arthur Thomas had no opportunity to raise this particular issue in this particular form prior to this date because until just prior to the time of the appli-

cation for Writ of Habeas Corpus he could not obtain and did not have the sworn confirmation of the head of the State Highway Patrol of Arizona, Mr. Gregg Hathaway, that he had issued such an order. Arthur Thomas had no opportunity at that time to present these issues in the State Court, inasmuch as he had exercised all of his rights of appeal in the State Courts and the only procedural remedy available to him was a Federal Writ of Habeas Corpus.

The Federal District Court, after examining the transcript of record and the briefs of the Defendant and the State, as filed in the State Courts, denied the application without having the Defendant brought into a hearing to testify and without issuing the requested subpoenas and having a hearing on the witnesses which the Defendant wished to present to the Court in proof of his allegation that Gregg Hathaway had issued an order that the Highway Patrolman in question should not give any statement to the Defendant or his Counsel and should respond only to a subpoena to appear at the Trial Court and testify under oath at the trial. Defendant Arthur Thomas, through Counsel, in fact requested and made application of the United States District Court for the District of Arizona, to issue a subpoena to Gregg Hathaway, and Gregg Hathaway had assured Defendant's Counsel that he would appear to testify in response to a subpoena.

It is the denial of such relief and permission to place such evidence before the District Court that the Defendant appealed to the United States Circuit Court of Appeals. The U. S. Circuit Court of Appeals for the Ninth Circuit denied Defendant's appeal and affirmed the lower Court's decision. It is from that affirmation that this application for Writ of Certiorari was made.

(f)

ARGUMENT

The prime question presented throughout all of the appeals of the Petitioner, Arthur Thomas, has been whether or not, when considering all of the facts in the case, the conduct of the State Trial Court in admitting into evidence a confession by the Defendant as to his culpability in the murder of the deceased, Janie Miscovitch, was such error as to be a denial of the Defendant's rights to a fair trial, in accordance with the United States Constitutional provisions providing for due process.

The question of whether or not it was error, then, resolves itself to the problem of whether or not the confession was obtained by coercion. To understand whether or not the confession was obtained by coercion, one has to look into all of the circumstances involved.

See:

Ashcraft v. *Tennessee* (1944), 322 U.S. 143, 88 L.Ed. 1192, 64 S.Ct. 921.

The background of this case concerning the voluntariness of the confession of the Defendant Arthur Thomas is as follows:

The Defendant was a Negro, approximately 27 years of age, an itinerant cotton picker; he lived in a shanty with his common-law wife in a predominantly Southern community, a community which still exercises Jim Crow practices. He was charged with murdering a middle-aged, respectable, hard-working white woman. Petitioner had no friends, no attorney, no funds. The murder was apparently a vicious one, the deceased dying from a stab wound in the heart, and part of the body was consumed by fire, and there was intimations throughout the trial, which must

have existed previously in the minds of the people who arrested the Defendant, that there was not only a murder, but that there had been a criminal assault of the deceased.

Defendant was arrested the 17th of March, 1953, in the afternoon, and was not taken to a committing magistrate and arraigned until the following day, March 18, at noon time, which was a violation of the Statutes of the State of Arizona, to-wit:

A.R.S. 1956, 13-1417;
A.C.A. 1939, 44-107;
Rules of Criminal Procedure, Par. 6, A.R.S. 1956.

That he was taken immediately after his arrest to the mortuary, about twenty-five miles north of where he was arrested, and was forced to view the grisly remains of the deceased. At the time of his arrest, he was unarmed, and offered no resistance, but was roped about the neck in the presence of the Sheriff, and there was testimony of an Arizona State Highway Patrolman that the Sheriff, Jack Howard, had said, in effect, "If you don't tell them you did it, I will let them hang you."

That subsequently, within approximately twenty minutes, the Petitioner, Arthur Thomas, was taken to another point in the general vicinity, and watched while another Negro, who was also under suspicion for the charge, was roped by members of the posse on horseback and dragged across the open field at the end of a rope, and the Petitioner was again roped around the neck and body with the other Negro by the same members of the posse.

The Trial Court ruled, in an ancillary procedure, as provided under the laws of the State of Arizona, to-wit:

Kermeen v. *State*, 17 Ariz. 263, 171 Pac. 738;
Indian Fred v. *State*, 36 Ariz. 48, 282 Pac. 930;
State v. *Romo*, 66 Ariz. 174, 185 Pac. 2d 757;

that as a matter of law, a confession obtained by the County Attorney at his home twenty minutes after the Petitioner Arthur Thomas' arraignment on the day after his arrest, to-wit: on March 18, 1953, was inadmissible for the reason that the coercion of the Defendant occurring at the time of his arrest on the 17th of March was such as to place the Defendant Thomas in a sense of fear, and that therefore the confession was involuntary and inadmissible.

See Transcript of Testimony, pages 2063 through 2066 of the Transcript of Testimony contained in eight volumes, a copy of which is annexed hereto as a portion of the Appendix, as pages 21 through 25.

Also the Court ruled that the confession obtained from the Defendant Arthur Thomas on April 1, after Counsel had been appointed, while the Defendant was incarcerated in the same jail which was run by the Sheriff who had arrested him, and helped at the roping of the Defendant, was inadmissible on the basis of the continuing fear arising out of the incidents of his original arrest. The County Attorney who had tried the case attempted to deny that Counsel W. Edward Morgan was really Counsel in the case, even though the Defendant had been arraigned in the Superior Court prior to April 1, and at which time Counsel was appointed, and even though the record indicates that prior to April 1 the County Attorney and the Defendant's Counsel, W. Edward Morgan, had corresponded regarding several motions, all of which is set forth in some particularity in an Affidavit filed by Counsel in his original Petition for Certiorari with the United States Supreme Court in October, 1955.

The Trial Court allowed into evidence before the jury the confession of the Defendant, Arthur Thomas, Petitioner herein, obtained on March 18, 1953, before a Magistrate, on the theory that the confession was before a Magistrate,

in open Court, to-wit: a Justice of the Peace in his court-room, and that the only person present who was present at the roping of the Defendant, Arthur Thomas, was Sheriff Jack Howard, who, the evidence which had been introduced by the State up to that point would indicate, had kept the unofficial posse of local ranchers (all white men) from completing the lynching of the Defendant, Arthur Thomas. Subsequently, and only after the State had rested, did the Defendant put on the testimony of the Arizona State Highway Patrolman, Harry Selchow, which conclusively showed that the Sheriff had taken an active part in the roping, and had threatened the Defendant, that he either admit that he had committed the crime, or he, the Sheriff, would let the mob go ahead and finish their roping of him.

(See our Appendix, pages 23-26, which is a true copy of pages 2324 through 2329 (pp. 38-43 from Petition for Certiorari) from the original Transcript of Testimony in the original trial in the Superior Court of Cochise County, in the original case of *State of Arizona* v. *Arthur Thomas.*)

The State Court, in its original decision in the case of the *State of Arizona* v. *Arthur Thomas*, 78 Arizona 52, 275 P.2d 408, and the Federal District Court, in its decision and Order denying Petition for Writ of Habeas Corpus (T. 7), and the United States Circuit Court of Appeals for the Ninth Circuit (T. 20, 26), all placed a great deal of reliance on the statement that the jury had submitted to it the question of whether or not the confession of Arthur Thomas, given to Judge Frazier at the time of his original arraignment in the Justice Court, was voluntary or involuntary; that it must have been that the jury found that the confession was voluntary, and therefore that the jury having decided that, no other body or Court could examine that issue. This line of logic has always borne some question of validity in Counsel's mind.

The law in the State of Arizona is not that, if the jury were to find that the confession was involuntary, that they must acquit the Defendant, but only that they may disregard that, or that if there is sufficient other evidence to convict the Defendant, the jury may do so.

Therefore the problem is entirely this, between what the jury in the trial had to determine, and what the Federal Appellate Courts must decide. And also, there is a substantial difference between the question which the State Supreme Court must propound, and what the Federal Courts must examine, in that, as set forth in the opinion of the State Supreme Court in the original opinion in this case, the *State of Arizona* v. *Arthur Thomas*, 78 Ariz. 52; that in accordance with the Arizona Constitution and State opinions, that a conviction will not be set aside if substantial justice has been done.

There is in the State of Arizona no method by which a Defendant might obtain special verdicts from a jury, and therefore as a matter of fact there is no way to determine whether or not the jury did or did not in the instant case decide that the confession of Arthur Thomas of March 18, 1957, to Justice Frazier, was or was not voluntary. The Supreme Court of the State of Arizona only had to decide whether or not substantial justice was or was not done, and if in their opinion there was substantial justice done, then whether or not the conviction was or was not voluntary would not of itself necessitate that the conviction would have to be set aside. This line of argument was adopted by the State in its Answering Brief in the original case, and the United States Supreme Court's decision of *Stein* v. *New York*, 346 U.S. 156, 97 L.Ed. 1522, 73 S.Ct. 1077, see page 68 of Appellee's Brief filed in the Supreme Court of the State of Arizona, in the *State of Arizona* v. *Arthur Thomas*, Case No. 1045, which was the

case which resulted in the written opinion found in the official reports as 78 Ariz. 52.

In the decision in *Stein* v. *New York, supra*, the Supreme Court of the United States enunciated a doctrine, which doctrine was outside of the habitual frame of reference of decisions by that Court; that is, the Supreme Court held that if the record of the State Court's proceedings indicated that there was sufficient legally admissible evidence to justify a conviction, the Supreme Court would not upset such conviction because there had been admitted supporting evidence which was illegal and violative of the United States Constitution; but in *Leyra* v. *Denno*, 347 U.S. 556, 74 S.Ct. 716, the United States Supreme Court returned to its main channel of constitutional interpretation; that is, that whenever the substantial constitutional rights of the Defendant are violated, regardless of whatever other evidence there is of guilt, the matter before the Court is to cure the violation of the United States Constitution, not to determine the issue whether the Defendant was or was not innocent, or whether or not there was sufficient evidence aside from the illegal and inadmissible evidence to convict the Defendant.

In determining whether or not the confession of the Defendant before the committing Magistrate on March 18, 1953 was or was not coerced, and what the reaction of the trial jury was, it should be noted that the jury did not know that there was a confession obtained twenty minutes after the arraignment on the 18th, and that there was a further confession on April 1 by the Defendant. The only thing the jury knew was that the man was before a magistrate and admitted that he was guilty, and didn't know that the man had confessed subsequently, and that the Court, as a matter of law, understood those confessions to be the result of coercion, which coercion was

impressed upon the Defendant on March 17, the day of his arrest. It is clear, then, that there is a difference in the yardstick by which the question of whether or not the confession of Arthur Thomas was admissible or inadmissible, was error or not error, was coerced or not coerced, between the one used by the United States Supreme Court, which solely determines whether or not it was in fact coerced, and that of the trial jury, which we must guess determined that the confession was not coerced, and the yardstick of the Supreme Court of the State of Arizona, which was to see whether or not there was substantial evidence to convict the Defendant.

On the question of whether or not the Federal District Court, upon the application of the Petitioner for a Writ of Habeas Corpus, could rely solely on the record, and the decision of the Arizona State Supreme Court, it is interesting to note that in his memorandum opinion of March 13, 1956, he says, and I quote:

> "I desire to supplement the remarks I made at the oral hearing, by stating that the language of the United States Supreme Court, in *Brown* v. *Allen*, 344 U.S. 443, dealing with confessions, must be read in the light of what the Supreme Court said later in *Stein* v. *New York*, 346 U.S. 156—brought to my attention by the County Attorney and the Assistant Attorney-General."

If, then, as by his own words, the Federal District Court was following the ruling of the Supreme Court in *Stein* v. *New York*, *supra*, then he, too, was only looking to see whether there was substantial evidence of the Defendant's guilt, and not whether or not there was a violation of the Constitution, which violation of the Federal Constitution alone, regardless of whether or not sufficient other evidence to convict the Defendant was present, would demand a new trial for the Defendant.

Each Court has relied fundamentally upon the doctrine of substantial justice. Each Court has relied on the myth that the jury in the original trial determined that the confession was fundamentally voluntary. Yet, though stated in the original decision of the Supreme Court of the State of Arizona, "It is clear that the Defendant is guilty," there has never been a clear-cut examination on the merits whether or not the statement made by the Defendant, Arthur Thomas, was or was not coerced at the time he was before the Magistrate on March 18, 1953.

The question is, how many fictions can you build up upon which to predicate a denial to this Defendant of an opportunity to show that his rights were violated? Is there any question that the Defendant was a man without any funds; without any friends in the community; that the Negroes were a tiny minority of the population; that it was a Southern community; that it was current belief at the time that the murdered woman had been criminally assaulted; that the Defendant had no Counsel present at the time of the arraignment; that he was in the presence of the Sheriff who had allowed him to be roped and dragged, and who had threatened him that if he didn't tell the truth, he would let him be hanged; that the defendant had been taken and shown the grisly remains of the deceased, just the night before being brought the next day before the committing Magistrate; that his rights had been violated in not being brought before a committing Magistrate forthwith, as provided in the Statutes and Constitution of the State of Arizona?

It would then appear that, in accordance with the decision of the Ninth Circuit Court of Appeals heretofore referred to in this case, that some reliance is placed upon the fact that the trial Judge didn't grant a new trial on the issue as to whether or not the confession was admis-

sible or not. The time sequence of the evidence becomes very important in understanding this point. It is not denied anywhere in the record or in connection with Petitioner's petition for a Writ of Habeas Corpus, or in his Appeal to the Ninth Circuit Court of Appeals; or denied by State of Arizona or any of its agents, that the Superintendent of the State Highway Patrol, an officer of the State of Arizona, ordered a witness, Harry Selchow, as an employee under the said Gregg Hathaway, not to discuss the case with the Defendant or his Counsel, and only to respond to a subpoena of a duly constituted Court, and to only give testimony under oath at the trial; nor is it denied that there was no process by which the Defendant could get a subpoena issued and take the testimony of that witness, Harry Selchow, prior to the trial. Nor is it denied that the Defendant did not therefore know what Harry Selchow would or would not testify to, if called as a witness.

On the trial of the case, when the State attempted to introduce the two confessions of March 18, the one before the committing Magistrate, the second one obtained twenty minutes later, at the County Attorney's home, and the third one, obtained April 1, the Trial Court heard evidence as to the voluntariness of the confessions outside of the presence of the jury. The defendant had issued a subpoena for the witness, Harry Selchow, to give testimony, and to be present at that time.

However, the Court made its ruling, that the confession of March 18, obtained at the County Attorney's office, was irregular, as being involuntary, and ruled that the confession of April 1, 1953, was irregular as being involuntary, both being coerced by reason of the method of the Defendant's arrest, and when Defendant's Counsel attempted to put on further evidence which would have included Harry Selchow, on a gamble that Harry Selchow would tell the truth of what had occurred, and implicate the Sheriff, the

Trial Court refused to allow the Defendant to put on any more evidence concerning the putative lynching.

The Defendant, not knowing what Harry Selchow's testimony was going to be, could not then, as part of his objection to the Court's ruling denying him the right to put on further evidence concerning the putative lynching and resultant coercion of the Defendant, could not make an offer of proof, which offer of proof could have been made, and could have shown the Court that the Sheriff, whom the Court was relying upon as being a good friend of the Defendant, and therefore giving the confession of the Defendant at the time of arraignment before the Magistrate an aura of voluntariness, was in fact a real party to the putative lynching.

Therefore the Court relied, in the ancillary procedure to determine whether or not the confession of March 18 was or was not voluntary, on a false statement of fact.

After the Court had ruled, and allowed the issue of the confession of the Defendant before the Magistrate to go to the jury, the trial Judge had no more control, even though the Defendant was now in a position of jeopardy, and had to take a chance and put a witness on the stand with whom he had no opportunity to discuss the case or his testimony prior to the trial, by reason of the act of the agent of the State of Arizona, to-wit: Gregg Hathaway, the Superintendent of the State Highway Patrol. It was Selchow's testimony which, for the first time, indicated the true role which the Sheriff took in the putative lynching of the Defendant.

It is interesting to note that, in accordance with the testimony of the Sheriff, which is set forth in the Appendix at pages 26-36, he never attempted, nor did the County Attorney ever prosecute, or attempt to prosecute, the two

local ranchers who, on horseback, roped and dragged the Defendant, Arthur Thomas, and the other Negro suspect, Ross Lee Cooper; that in fact, the County Attorney advised the two said ranchers to claim the privilege of refusing to testify when called upon by the Defendant, in accordance with the Fifth Amendment to the United States Constitution, to refuse to testify for the reason that they might tend to incriminate themselves. This, then, was the high moral sense which the County Attorney, who prosecuted the case, and the Sheriff, who arrested the Defendant and testified against him, had in regard to their duty as public officials, to see that parties who broke the law of the State of Arizona were properly investigated and prosecuted.

The Defendant and his Counsel don't know whether or not the jury would or would not have convicted the Defendant, if the confession of the Defendant of March 18, 1953, to the committing Magistrate, had not been allowed to go to the jury. We don't know whether or not they thought it was coerced or not. Legally speaking, there may have been sufficient circumstantial evidence for the jury to have felt that the defendant was guilty without considering the confession.

Therefore, it is respectfully submitted that the District Court erred in not granting to the Defendant the right to subpoena and bring forward the witnesses to show how the Defendant's rights had been violated, in that he had not had an opportunity to examine his witnesses prior to trial by reason of the conduct of an officer of the State of Arizona, to-wit: the head of the State Highway Patrol. It was error for the Federal District Court Judge to rely in his decision upon the decision of *Stein* v. *New York*, *supra*, in determining whether or not he would issue or grant Petitioner's Writ of Habeas Corpus.

This Court has stated that the use of any confession obtained in violation of due process requires the reversal of a conviction even though unchallenged evidence, adequate to convict, remains.

Gallegos v. *Nebraska* (1951), 342 U.S. 55, 96 L.Ed. 86, 72 S.Ct. 141;
Stroble v. *California* (1952), 343 U.S. 181, 96 L.Ed. 872, 72 S.Ct. 599;
Leyra v. *Denmo*, 347 U.S. 556, 74 S.Ct. 716.

Whether or not the other evidence in the record is sufficient to justify a verdict of guilty is not necessary to consider where a coerced confession was introduced over Defendant's objection; if such admission denied a Constitutional right of Defendant the error requires reversal.

Lyons v. *Oklahoma* (1944), 322 U.S. 596, Note 1, 88 L.Ed. 1481, 64 S.Ct. 1208.

In summary, to analyze whether the confession by the Defendant, Petitioner herein, was involuntary, one should examine each of the elements which would show that confession involuntary. Each of the following enumerated elements which would indicate that the confession before the Magistrate was involuntary have been ruled upon by this Court in one case or another so well known to the Court that Counsel would not abuse the Court's eyesight by reiterating them:

1. The Defendant was an ignorant farmhand.
2. He was a Negro in a white community.
3. He was a Negro accused of killing a white woman.
4. He had no friends or relatives to aid him.
5. He was without Counsel or funds to hire Counsel.

6. He had no expectations of getting any funds to obtain Counsel or to expect that Counsel would be made available to him.

7. He was roped and dragged by a white posse.

8. He saw a fellow Negro roped and dragged by the same posse.

9. He was roped and dragged with another Negro.

10. He was not immediately taken to a Magistrate for arrest but was taken thirty miles north of the point of his arrest to view the dismembered and burned remains of the deceased in a mortuary.

11. He never had local Counsel until the day of trial, but had Counsel who had to travel seventy miles from the city of Tucson to see him.

12. He was alone, without friends or Counsel in the jail, which was run by the Sheriff who had taken part in his roping.

13. He was besieged for a confession in his jail cell even after Counsel had been appointed for him, and was still so afraid that even the Trial Court held that the confession obtained nearly a month after his arrest was involuntary as being still under coercion.

(g)

CONCLUSION

The Petitioner respectfully requests that the relief he desires is as follows, either alternately or cumulatively:

1. Remand the case back to the Federal District Court with instructions to that Court to grant the Petitioner Arthur Thomas the right to present additional testimony concerning the issue of the voluntariness of the confession.

2. Remand the case back to the State Court for the purpose of a new trial on the basis that the Defendant was denied due process of law in the original trial before a jury in the State, for the reason and upon the grounds that the Constitutional rights of the Defendant were violated when the State Court permitted the introduction of the confession, said confession being held to be involuntary by this Court.

Dated January 8, 1958.

Respectfully submitted,

ARTHUR THOMAS, by his next best friend and Counsel

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APPENDIX

Transcript of Testimony

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Mr. Polley: Nothing except that we resist the motion, if the Court please.

The Court: Well, the Court feels this way about it. I have read your authorities on voluntary and involuntary confessions, and I have studied the citations carefully, and I have studied the exhibits in relation to these, and the Court recognizes the fact that the friends and neighbors of the deceased might well have been highly and justifiably incensed on finding her slain body. Many of us might well have felt the same way. However, neither good morals nor the Constitutions of the United States and the State of Arizona will tolerate an individual or a group taking the law into their own hands.

There are countries where confessions are extorted by devious and improper methods that run counter to our American way of life or our constitution. Our ancestors gave us the Bill of Rights and the law of due process, and to scuttle these time-honored and sacred laws would be to invite anarchy and dictatorship.

The Court will not in any way honor any confession procured by and under threat of attempted lynching. Under such circumstances, a confession is not voluntary, and its

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credibility is doubtful, and therefore barred by our constitution, and the Court, therefore, feels—

I have been studying the matter. Counsel brought this matter to a head before the Court intended saying any more about it, but since counsel has, I am going to sustain counsel's objection to the introduction of State's Exhibits 51 and 53, because they are confessions and they are obtained, having been procured by threat of lynch, and the Court does not propose to be a party in anywise to any attempt of lynching.

And I will deny the motion for mistrial. That takes away the confession that you say that Percy Bowden secured, and it takes away No. 51.

I believe 53 was the one that was under the influence of Percy Bowden.

May I see those?

State's Exhibit 53. This is the one, I believe, where Percy Bowden was involved, and 51 is the one taken on the 20th day of March. Both of those are confessions and the Court will sustain the objection to the introduction of those two exhibits in evidence, and we shall proceed.

If counsel wishes to see the exhibits, he may see what the Court has done.

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Mr. Tomlinson: As I understand it, your Honor, the Court denies 51 and 53.

The Court: The Court denies 51 and 53. The other, the Court of course can in nowise say that that is a confession. No. 52 is not a confession.

Mr. Morgan: We haven't seen this one, you know, your Honor.

The Court: Fifty-three is the one you haven't seen, and it is out anyway. The Court is not going to permit it to be introduced.

Mr. Morgan: If your Honor please, you understand our motion for a mistrial is predicated on a theory of lack of preparation for trial. You see, that is our basis there, your Honor, and it is not just on the matter of confessions. It is a different matter, if the Court please.

The Court: Well, if your client hasn't seen fit to apprize you of all of these things, Mr. Morgan, it is no fault of the State, and if your defendant has left his counsel in the dark, that is his lookout and not the State's or the Court's, and the Court is going to deny your motion for a mistrial.

Mr. Morgan: Could I make one further statement on that matter?

The Court: Sure.

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Mr. Morgan: Our theory is that the defendant was in fear from the lynching—from the roping. Excuse me, your Honor. The roping. Strike that, please.

That that fear continued through; that the defendant was still in that fear, and he was given a confession to sign eleven days after the attorney was appointed, if the Court please, and it was a continuing fear.

The Court: You mean he was in fear of his own counsel?

Mr. Morgan: What good is his counsel if a man is sitting in jail and the counsel says, "I will plead not guilty. I am your buckler against the whole world." and then they come up in jail and have him sign a confession.

That destroyed the man's confidence in his counsel. No wonder the man hasn't spoken to us, That is the reason for the mistrial.

The Court: The Court rules those out. The Court denies the motion for mistrial.

Let us proceed. If there is any further statement, you may make it for the record, but the Court is going to deny the motion.

Mr. Morgan: No further statement, if the Court please.

* * * * * * *

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Further direct examination (Harry Selchow).

By Mr. Morgan:

Q. Now you were an officer of the Arizona State Highway Patrol on March 17, 1953?

A. I was.

Q. Were you out at Kansas Settlement at any time that

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day, Officer?

A. I was.

Q. Were you out there in your official duty capacity?

A. I was, sir.

Q. At any time that afternoon, did you see Arthur Thomas, the man who has now been identified as Arthur Thomas?

A. I did.

Q. Where did you see him, Officer?

A. I saw Mr. Thomas laying on the ground.

Q. And where was that approximately, according to State's Exhibit 7 behind you, Officer Selchow? Would you point out—let me point out to you that this purports to be the north-south highway known as Kansas Settlement highway, and that this purports to be the barracks in which Ar-

thur Thomas lived, and this purports to be the store, the Hitching Post Store, as indicated by this notation.

Now on which side of the road did you find Arthur Thomas?

A. On the west side of the road.

Q. That would be over on this side here?

A. That is correct.

Q. And about how far south of the barracks did you find

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him?

A. Oh, it must have been about a mile, I think.

Q. And when you came up upon him, he was lying down? Who else was present, if you remember?

Mr. Polley: If the Court please, this is his witness, and we are going to object right now to leading the witness.

The Court: Yes. Try and avoid leading the witness, Mr. Morgan.

By Mr. Morgan:

Q. Who was present when you came up, if anyone?

A. Mr. Byrd and Mr. Brashear.

Q. What happened next?

A. When I arrived there, Mr. Byrd was talking to Mr. Thomas, asking about some cuts on his fingers, and about that time Mr. Howard got there, and Mr. Howard talked to him.

Mr. Pidgeon: If the Court please, we are going to object to the narrative testimony.

The Court: Yes, I will sustain the objection.

By Mr. Morgan:

Q. Mr. Howard came up, and what did he do, if anything?

A. He knelt down beside Mr. Thomas and he talked to

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him and asked him why he had killed the woman. He said, "No, I didn't. The other boy did."

Mr. Howard said, "We have your blood from the store. We have your shoes, and we have tracked you from the store."

Q. Then what happened, if anything?

A. Then Mr. Howard said, "You are under arrest." And Mr. Thomas stood up and I put the handcuffs on him.

Q. And then what happened, if anything?

A. Somewhere from behind me, a rope was thrown over Mr. Thomas' neck, and he was pulled back into me, and we stumbled a little bit, and I had ahold of the rope, and then Mr. Howard came around me, and I said, "Jack, this is no way to handle this."

Mr. Howard went on to the rope and took ahold of it. At that point, he says, "Will you tell the truth, or I will let them go ahead and do this," or, "I will go ahead and let them use this."

Q. Which Jack are you referring to?

A. Mr. Howard.

Q. Sheriff Jack Howard?

A. That is correct.

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Q. And he said what?

A. "Are you going to tell the truth, or ought I go ahead and let them use this on you?"

Q. And who was he referring to?

A. Mr. Thomas.

Q. All right. What happened then, Officer Selchow, if anything?

A. Well, Mr. Thomas was jerked about that time, and I walked back towards my car.

Q. Mr. Thomas was jerked? How was he jerked?

A. Well, the slack was taken out of the rope.

Q. And you went back to your car?

A. I started back towards my car, yes, sir.

Q. Then what happened, if anything?

A. The next time I saw them, they were—the rope was off of Mr. Thomas' neck, and they were walking toward Mr. Howard's car.

Q. Did you see anything more that afternoon of Mr. Thomas?

A. Only—when I got back on this highway here, I saw Mr. Thomas in Mr. Howard's car.

Q. Did you see Ross Lee Cooper that afternoon?

A. No, sir.

Q. Now at the time that Arthur Thomas was roped
[Page 2329]
around the neck, and Sheriff Jack Howard made that statement, were there any other statements made in the presence of the defendant?

A. None I can remember.

Mr. Morgan: That is all. Your witness.

* * * * * * *

[Page 2210]

Recross examination (Jack Howard).

By Mr. Morgan:

Q. Did you notice any other wounds on the defendant, or any other burns?

A. I noticed a slight one on the neck.

Q. Didn't you testify on direct examination, Jack, that you didn't see any wound on his neck?

A. I don't think so. I might have. I noticed a little .... (Indicating).

Q. All right, Jack. When was the first time that you saw Arthur Thomas? What date and Where?

A. March the 17th, about 2:30 in the evening.

Q. About 2:30 in the afternoon?

A. Somewhere along in there.

Q. Where was this, Jack?

A. It was about, oh, I would say around two and a half miles—no, it wasn't that far. It was about a mile and a half, I guess, south of the Kansas Settlement store.

Q. What were you doing out there?

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A. About two hundred, maybe something, yards west of the Kansas Settlement Road.

Q. What were you doing out there, Jack?

A. I was looking for tracks.

Q. For what reason?

A. Well, we had had a murder. I was looking to run the men down.

Q. You were looking for a murderer?

A. Yes.

Q. Now where you found Arthur Thomas was on the same side of the road as the barracks building, is that correct? (Indicating.)

A. That is right.

Q. Down here among a bunch of mesquite, is that correct, referring to the bottom portion of State's Exhibit 7 on the west side of the road?

A. That is right.

Q. And what did you do when you found these tracks?

A. I followed them as far as I could.

Q. All right. And did you discover Arthur Thomas?

A. After we found him.

Q. And who found him, if you know?

A. Mr. Brashear.

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Q. Mr. Brashear?

A. Yes, sir.

Q. And he found him in a mesquite bush, is that right?

A. That is right. What he said.

Q. And you came up there, and Mr. Brashear called you?

A. No, he didn't call me. Somebody called me.

Q. Somebody called you, and you came up there, and when you came up, who was present? Arthur Thomas, Brashear, and who else?

A. Well, I believe Mr. Croom and Selchow.

Q. Selchow, Croom. That is Officer Croom, is that right?

A. That is right.

Q. And this was Officer Selchow from the Arizona State Highway Patrol, is that right?

A. That is right.

Q. And whom else?

A. Mr. Brashear. Did I name him?

Q. Yes.

A. Arthur Thomas and myself. That is about all I know. There was quite a few around there.

Q. Cecil Byrd was there? You know him, didn't you?

[Page 2213]

A. Cecil Byrd, that is right.

Q. Who else was out there, now?

A. I believe Mr. Cox came later on, or he was there pretty close. I am not sure.

Q. And there was some other people there, too, wasn't there?

A. Yes, sir.

Q. About ten or fifteen, weren't there?

A. I would say somewhere around there.

Q. And when you came up, what was Arthur Thomas doing?

A. He was laying on the ground.

Q. And then what happened?

A. When I got there?

Q. Yes.

A. I told him to get up.

Q. You told him to get up, and what did you say then?

A. I says, "You are under arrest."

Q. Did Arthur Thomas get up?

A. He got up.

Q. Did he try and run away?

A. No, I don't think there was any use in trying to run away.

Q. Just stood up?

A. Just stood up.

[Page 2214]

Q. Did you examine him to see if he had any instruments on him? Any guns or knives or anything like that?

A. No, I didn't.

Q. He stood up, and then what happened, Jack?

A. I asked him if he had murdered this woman.

Q. Yes. And what did he say, Jack?

A. No, he didn't.

Q. All right. That he didn't do it. And then what happened, Jack? Did you handcuff him?

A. He was being handcuffed while I questioned him.

Q. By whom?

A. Mr. Selchow.

Q. Officer Selchow?

A. Yes.

Q. He handcuffed him, and then what happened, Jack?

A. Somebody threw a rope on him.

Q. Didn't you see who it was?

A. No. I had my back to him. I just seen it when it went around him.

Q. It went around his neck, didn't it, Jack?

[Page 2215]

A. Well, I believe it was around his shoulders and neck.

Q. Shoulders and neck? How can you get a rope around the shoulders and neck?

A. It can go around this way. (Indicating.) Haven't you ever seen any——

Q. Oh. It was around one side of his neck, and then went around, is that right?

A. Well, it went around him.

Q. And then what did you say, Jack?

A. I said, "Stop that. I will take care of this."

Q. And then what did you do?

A. Took the rope off.

Q. How long between the time Thomas was roped and the time you took the rope off of his neck?

A. Just as soon as I could get to him.

Q. And you didn't see who roped him?

A. No, I didn't.

Q. Or did you just see the rope around Arthur Thomas' neck and the rope around somewhere else?

A. That is right.

Q. Who held the rope in his hand?

A. I believe it was Bob McComb.

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Q. Did you know who it was that day, Jack?

A. Never seen the man before, no.

Q. Did you ever try and find out his name?

A. No, sir.

Q. You have known Bob McComb, haven't you?

A. No, so help me God. A lot of people that I didn't know there.

Q. Now, Jack, when Thomas was standing there with the rope around one side of his neck, as you remember it, and around his shoulder, didn't you tell him, "See that rope there, boy? If you don't talk, I will let them rope you."

A. Absolutely not.

Q. You didn't say anything like that?

A. Let them rope him? The rope was already on. I taken it off immediately.

Q. You didn't say anything about letting them go ahead and lynch that boy, Arthur Thomas?

A. No, I taken the whole group down towards the car.

Q. You didn't say anything about letting him be roped if he didn't tell the truth?

A. Absolutely not.

The Court: Are all of the jurors hearing the answers? All right. Speak up, Mr. Howard.

[Page 2217]

By Mr. Morgan:

Q. You never said, "I will let you go and throw that rope over a tree over there if you don't tell the truth"?

A. No, sir.

Q. Did you say anything similar to that?

A. No, sir, absolutely not.

Q. You know you are under oath now?

A. That is right.

Q. And you never said anything similar to that?

A. No, sir.

Q. Now did anyone else say anything about roping or lynching Thomas?

A. No, sir.

Q. At that time?

A. No, sir.

Q. No one?

A. Right. No one.

Q. Did anyone say anything about, "If you don't tell a better story, we will hang you."

A. No, sir.

Q. Referring to Thomas?

A. No, sir.

Q. Now didn't they start to lead Thomas away while that rope was around his neck, and you had to walk after him to get that rope away?

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A. I did.

Q. And they went fifteen or twenty feet or so, didn't they, Jack?

A. No. In my estimation it wasn't over ten or twelve.

Q. And they headed down towards those trees?

A. No. They headed towards my car, and the trees was off to the left. That old cottonwood.

Q. And they had to go by that cottonwood to get to your car?

A. Pretty close.

Q. And you don't know whether they were starting for the trees or for your car, do you?

A. They weren't going nowhere. I stopped them.

Q. You don't know whether they started to go toward the trees or that car?

A. They just started off, and I stopped them.

Q. You took the rope off, and what did you do then?

A. Taken him immediately towards the car.

Q. And he didn't try to run away, did he, Jack?

A. No.

Q. He didn't have any guns or pistols on, did he?

[Page 2219]

A. No, sir.

Q. And you took him down to your car, walked him down to your car?

A. That is right.

Q. And you got in your car and went over to find Cooper, didn't you?

A. Yes he said he knew where Cooper was.

Q. And you went up to find Cooper, didn't you?

A. That is right.

Q. How far did you go to find Cooper, Jack?

A. Oh, I would say it was around maybe two and a half miles.

Q. Two and a half miles?

A. Something like that.

Q. You found him north of the barracks and west of the barracks, is that correct? Well, turn around and we will look at State's Exhibit 7 here.

Pointing out State's Exhibit 7, it was over west of the northeast quarter of Section 26, is that right, Jack?

A. Somewhere over there.

Q. If State's Exhibit 7 were extended west, it would be over here someplace.

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A. That is right.

Q. And Cooper was over there picking up roots? Isn't that what he was doing?

A. He was piling brush.

Q. When you pulled up your car there, you saw Cooper being roped about a couple of hundred feet away, didn't you?

A. When I pulled up in my car?

Q. Yes.

A. No, sir.

Q. You saw him roped, didn't you?

A. Yes, sir.

Q. And you saw him roped just about the time you got there, wasn't it?

A. No. I had been across the field.

Q. You had been across the field and you saw Cooper roped?

A. That is right.

Q. And he was roped around the neck, wasn't he?

A. No, sir, he was not.

Q. Oh. He was roped above the waist?

A. Right here. (Indicating.)

Q. And who roped him, Jack?

A. I didn't know that man.

Q. Did you ever find out his name, Jack?

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A. Just the other day.

Q. What was his name?

A. Wasn't it—I believe it was Arzberger, or something like that.

Q. And who did you find out from, Jack?

A. I heard it here.

Q. Did you ever try and find out that man's name?

A. No.

Q. And he roped him, and he brought him across the field to you, is that right?

A. No. He was pretty close to the car.

Q. Pretty close to the car? So Thomas could see it, too, I guess.

A. Thomas was in the car at the time.

Q. And he was on horseback, wasn't he? This man that roped Cooper?

A. Yes.

Q. And he led him across the field?

A. He followed him along.

Q. And he jerked a little bit. (Indicating.)

A. No. Just led him along. he was holding to the rope with his hand.

Q. Holding onto the rope?

A. Around here. (Indicating)

Q. He was holding onto it with his hands?

[Page 2222]

A. And I got up there and taken it off of him.

Q. Right in front of the car, you took it off, didn't you, Jack?

A. Yes. It was pretty rough ground there. All broke up and cloddy.

Q. Pretty hard to walk across, isn't it, Jack?

A. Pretty soft. You can walk across it, but it was broken ground.

Q. And you handcuffed Cooper, didn't you?

A. No, I didn't handcuff Cooper.

Q. Who handcuffed him?

A. One of the other boys.

Q. Who was there? You were there. Thomas was there, Ross Lee Cooper was there, the fellow who turns out to be Gus Arzberger, he was there. Whom else?

A. I believe——

Q. Brashear was there?

A. Brashear was there.

Q. And Croom was there, wasn't he?

A. Well, he got there a little later.

Q. And Cox was there?

A. No, I believe Cox—he could have been. I think he went back to Willcox.

[Page 2223]

Q. And Selchow?

A. No, he went back.

Q. And Bill Sauders, the photographer, he was around there, wasn't he?

A. I believe he was.

Q. He took some pictures of the roping, didn't he?

A. Well, he taken a picture there. Not about the—not of the roping. I believe he taken a picture over there where Thomas was by the fence.

Q. And after you got Cooper back to the car, you got Thomas out of the car, didn't you?

A. I asked him to get out and look and see if this was the man he said murdered the woman. He said, "That is him."

Mr. Morgan: We move that the answer be stricken as unresponsive. I asked him if he asked Thomas to get out of the car, and it was unresponsive, your Honor. I just asked him one simple question, as to whether Thomas got out of the car.

The Court: The balance of the answer may be stricken and the statement about Cooper, the jury are instructed to disregard.

By Mr. Morgan:

Q. All right. Now after you got out there and you found
[Page 2224]
Thomas there, and then Cooper was handcuffed, both Cooper and Thomas were roped again around the neck, weren't they?

A. They was roped while I was standing there questioning them.

Q. And right around the neck, weren't they?

A. Well, the rope went around them. That is all. I taken it off.

Q. And who roped them that time?

A. Well, it was that other guy.

Q. Gus or McComb?

A. No.

Q. Another guy?

A. No. I called his name.

Q. Gus Arzberger?

A. Arzberger.

Q. He roped them again right around the neck, and they jerked to the ground, didn't they?

A. Yes. He just pulled them down on their knees.

Q. He just pulled them down on their knees? He was still on a horse, wasn't he?

A. Yes, he was still on a horse.

Q. They were your prisoners then, weren't they?.
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A. I had them under arrest.

Q. Yes. They were your prisoners?

A. (No answer.)

Q. And then Cooper—after they got up on their feet, you took the rope off, is that right?

A. No. I taken it off immediately.

Q. And then Cooper was roped again by Gus Arzberger, wasn't he?

A. No. No. I put them in the car.

Q. Now Brashear was there, wasn't he?

A. I believe he was up there.

Q. And if Officer Brashear said Cooper was roped again after Thomas and Cooper had been roped together, is he telling the truth?

A. He was roped out in the field, and after they were together. Just twice.

Q. Thomas was roped once where he was arrested?

A. Yes.

Q. That is once. Thomas was roped there. And Cooper was roped over here two and a half miles north, and then Cooper and Thomas were roped again?

A. That is all.

Q. Cooper wasn't roped again?

A. No, sir, not to my recollection.

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Q. Now at the time you were over there with Cooper and Thomas together and they were both handcuffed and they had both been roped, did anyone at that time make any statement about taking these boys out and roping them up, or lynching them?

A. No, sir absolutely not.

Q. Did you make any statement about the fact if they didn't tell the truth, you would let him go ahead and be roped?

A. No sir. Just put them in the car.

Q. You made no statement at any time out there at the time of the arrest of either Thomas or Cooper, or Thomas and Cooper, implying if these men didn't tell the truth, you would let them be roped?

A. No, sir. No, sir. That is not right.

Q. Now after you got Thomas and Cooper back in the car, where did you drive them to, Jack?

A. We came back to the Kansas Settlement road, and went to Willcox.

Q. About what time of day was that that you finally got in the car and started out for Willcox?

A. I believe it was around 4:30.

Q. And where did you take them up in Willcox?

IN THE

Supreme Court of the United States

ARTHUR THOMAS, *Petitioner,*
vs.
STATE OF ARIZONA, *Respondent.*

No. 88
October Term
1957

BRIEF OF RESPONDENT

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Cochise County Attorney

JOHN G. PIDGEON
Chief Deputy County Attorney

TOPICAL INDEX

LIST OF AUTHORITIES

LIST OF AUTHORITIES (Continued)

KEY TO REFERENCES

Wherever reference is made in the Brief, the following abbreviations refer to the following supporting documents:

RT refers to the page of the Reporter's Transcript of Testimony in the jury trial of petitioner in the Superior Court of the State of Arizona, in and for the County of Cochise, consisting of eight volumes.

TR refers to the page of the Transcript of Record filed in this Court by the petitioner.

Appendix refers to the page of the appendix attached to this brief.

IN THE

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ARTHUR THOMAS, *Petitioner,* vs. STATE OF ARIZONA, *Respondent.*		No. 88 October Term 1957

STATEMENT OF FACTS

Since the statement of facts as contained in petitioner's brief is inaccurate, in many instances untrue, and commingled with innuendoes, conclusions and arguments of counsel, it is deemed advisable by the respondent to restate the actual facts established at the trial:

Around 10:00 a.m., March 17, 1953, a Mrs. Bonnie Fraker called at "The Hitching Post", a grocery store operated by the decedent in the area of Cochise County known as Kansas Settlement which lies about 12 miles south of Willcox, for the purpose of delivering milk. She discovered smoke coming out from under the door and fire in the bed in the back room and immediately drove her car to a nearby building then under construction to summon aid. In response to her request, three workmen including the petitioner returned to the store and the fire was extinguished, with but little if any help from petitioner. The latter was heard to say that he couldn't stand the smell of burning flesh and the inference is permissible that this remark was

made before the presence of the body had been discovered.

An examination of the interior of the store building showed the cash drawer was open, some small coins were scattered about, and numerous blood spots appeared throughout the building. It appeared that some object had been dragged across the floor from the cash register to the back room of the store where decedent lived alone and there a body was found.

The charred body, identified as that of Mrs. Janie Miskovich, was found lying on her bed in the back room of the store. The mattress had been nearly consumed by a smoldering fire. More coins were found near the blood-stained bed. Two purses hanging near the bed were open and empty.

The medical examination showed that, while deceased had received blows to the head from some blunt instrument, death had resulted from two stab wounds in the heart. A large butcher-knife slightly blood-stained was found on a meat block at the rear of the store.

Investigating officers followed a trail of blood spots out the back door of the store and over some adjacent hard ground to a point where they found footprints appearing in the soft soil of a plowed field. One of these officers followed this trail of footprints with accompanying blood spots a distance of approximately a half a mile to a point near the barracks-type house where petitioner and several other laborers and their families lived. Further bloodstains were found just outside as well as within the barracks.

Several witnesses testified that the 13½-inch footprints evidenced that they were made by shoes with smooth soles and the heels dubbed or "worn off" at the backside. A pair of brown suede shoes taken from under petitioner's bed on March 17th—identified as being the only footwear belonging to petitioner—were introduced in evidence. They match the footprints described above both as to length and the condition of heel and sole.

Two bloodstained canvas gloves were later found, one in an old stove immediately outside these living quarters, and the other in the open pit of a privy near the house on on the trail of footprints and bloodstains the officers had followed. Both of these were gloves for the right hand and of the brand and style sold to Mrs. Miskovich at 9:00 p.m. on the night of her death by a salesman—the last person to see her alive—who testified the gloves he then delivered were the only canvas gloves in the store. It was shown that in the supply of gloves remaining in the store the next day there were two left-hand gloves for which there were no mates. The glove found in the outhouse contained cuts across the little finger and deeper cuts across the next two fingers. When petitioner was apprehended it was found that his right hand had been cut, the cuts extending across the last three fingers. Medical examination revealed thhat the little finger and ring finger were severely lacerated and that the tendons of these two fingers had been severed. An expert from the Federal Bureau of Investigation testified that an analysis of bloodstains taken from objects and the floor by decedent's bed and from the kitchen floor in the barracks, as well as those obtained from the canvas gloves, were left by type "A" blood as were the bloodstains on a piece of Kleenex removed from petitioner's wounded hand by the doctor who treated it.

Between 3:00 and 4:30 P.M. of the day preceding the discovery of the body, petitioner purchased some wine, beer and candy in the store. At about 6:30 P.M. petitioner and Ross Lee Cooper—a 17-year-old Negro, and one of the inhabitants of the barracks—left their quarters to "go to the store." Petitioner and Cooper returned to the barracks within a short time and immediately left for the avowed purpose of going to see one "Louis Max". They returned from this trip in about thirty minutes and Cooper, according to the testimony of two other occupants of the barracks, did not leave again that night. Petitioner thereafter left by himself and was gone for about three hours. There was testimony from which the jury might infer that the homicide took place between the hours of 10:00 and 11:00 P.M.

On the night before the body was discovered, petitioner was wearing his usual work clothes which were the only clothes he owned. The next morning he put on an old and worn pair of overalls belonging to someone else. There was no evidence adduced as to what became of his clothes. When he returned to the barracks around noon he removed the brown suede shoes and placed them under the bed where they were later found. He then put on an old pair of shoes, which he found in a trash can, from which he cut the backs (counters) as they were much too small for his feet.

That afternoon a search was instigated for the unknown killer by Sheriff Howard aided by a number of other peace officers, on foot, and some local ranchers, at least two of whom were mounted. The petitioner was apprehended one and one-half miles south of the store and off the road a distance of some 300 yards, under a mesquite bush and partially hidden

under a pile of tumbleweeds. He was then questioned and in response denied killing the decedent, but said he knew who did and named Ross Lee Cooper. He also denied having changed shoes and claimed that he had "cut his hand on a can".

Upon being questioned by the County Attorney immediately upon his arrival in Bisbee from Willcox, a matter of only a few hours after his actual arrest, he freely answered questions which amounted to a continuous denial of any personal guilt in connection with the death of Mrs. Miskovich, and explained in detail how the killing took place, but accused a young Negro boy named Ross Lee Cooper as being the killer. It was not until the next morning when he was taken before the Justice of the Peace that he admitted guilt in any form.

To avoid repetition, the facts surrounding the arrest of the petitioner and his making of the statements complained of will be included in a later portion of this brief.

The respondent, the State of Arizona, herewith presents its views under the general classification adopted by the petitioner under the two "questions presented".

THE COURT HAS NO JURISDICTION TO REVIEW THE FIRST QUESTION PRESENTED BY PETITIONER FOR THE REASON AND UPON THE GROUNDS THAT THE APPLICATION FOR WRIT OF CERTIORARI TO THE STATE COURT WAS NOT TIMELY FILED

The record shows the following pertinent matters:

On June 19, 1953, petitioner was convicted of murder in the Superior Court of Cochise County, Arizona.

Petitioner appealed to the Arizona Supreme Court from that judgment and from an order denying his motion for a new trial.

On October 18, 1954, in Cause No. 1045, the Supreme Court of Arizona affirmed the judgment of the lower Court. *State of Arizona v. Arthur Thomas,* 78 Ariz. 52, 275 P. 2d 408.

On November 16, 1954, the petitioner's motion for a rehearing was denied.

On December 2, 1954, petitioner filed a motion for a new trial in the Superior Court, Cochise County, Arizona. Said motion was primarily based on the grounds of new found evidence. The motion, filed under the Rules of Criminal Procedure, 357(c), Sec. 44-2004(c), ACA, 1939, now Criminal Rule 310, was denied and petitioner appealed to the Arizona Supreme Court.

On June 28, 1955, in Cause No. 1072, the Arizona Supreme Court affirmed the lower Court's denial of a new trial. *State of Arizona v. Thomas,* 79 Ariz. 158, 285 P. 2d 612.

On September 16, 1955, the Arizona Supreme Court denied a motion for rehearing.

On October 24, 1955, petitioner filed application for a writ of certiorari in this Court, No. 330.

The ninety-day period in which such application could have been timely filed expired on February 15, 1955.

On January 16, 1956, the above-entitled Court denied the petition for writ of certiorari to the Supreme Court of Arizona. *Thomas v. State of Arizona,* 100 L. Ed. 221.

On the 8th day of December, 1956, petitioner filed application for writ of certiorari in this Court.

The ninety-day period in which such application could have been timely filed, in so far as the State judgment is concerned, expired on February 15, 1955. Rules of the Supreme Court, Rule 22(1).

This Court does not have jurisdiction to entertain an untimely petition for writ of certiorari. *State of Maryland v. Baltimore Radio Show,* 38 U.S. 912, 94 L.Ed. 562; *Hope Basket Company v. Product Advancement Corporation,* 342 U.S. 833, 96 L.Ed. 630, 72 S. Ct. 44; *Rust Land and Lumber Company v. Ed Jackson,* et al, 250 U.S. 71, 63 L.Ed 850, 39 S.Ct. 424; *Citizens Bank v. Mary Opperman,* 249 U.S. 448, 63 L.Ed. 701, 39 S.Ct. 330.

Obviously, any right that petitioner may have had for a review of the judgment of the State Court by this Court has been waived by the untimely filing of the petition.

THE FEDERAL DISTRICT COURT DID NOT ERR IN DENYING PETITIONER A WRIT OF HABEAS CORPUS ON THE MERITS AS PRESENTED IN THE AFFIDAVITS AND RECORD

It must be admitted that all of the issues determined by the Federal District Court had been pre-

sented to and determined adversely to the said petitioner by the Supreme Court of the State of Arizona. *State v. Thomas,* 275 P. 2d 408. Applications to District Court on grounds determined adversely to the applicant by State Courts should be refused without further ado, if the District Court is satisfied by the record that the State process has given fair consideration to the issues. *Brown v. Allen,* 334 U.S. 443, 97 L.Ed. 469, 73 S.Ct. 397. The District Court had before it the petitioner's petition with supporting documents, the response of the State of Arizona with supporting documents, the entire transcript of testimony of the original trial held in the Superior Court of the State of Arizona, in and for the County of Cochise, all briefs filed either by the petitioner or the State of Arizona before the Arizona Supreme Court and the United States Supreme Court. Likewise the United States Court of Appeals for the Ninth Circuit had access to the above material when it reviewed the action of the District Court and affirmed. *Thomas v. Eyman,* 235 F. 2d 775. Even had there been a material conflict of fact in the transcripts of evidence as to the deprivation of constitutional rights, the Federal District Court was justified in depending upon the State's resolution of that issue. *Brown v. Allen,* supra.

THE FEDERAL DISTRICT COURT DID NOT ERR IN NOT ORDERING A HEARING IN THE PREMISES

While the ordering of such a hearing in a habeas corpus proceeding is within the power of the District Court, there is no iron-clad requirement that it do so. All of the pertinent evidence and arguments were be-

fore the District Court with the exception of the following items which will be discussed:

The only matter which petitioner claims in this Court that he was prevented from presenting to the District Court was the testimony of the petitioner himself and the testimony of G. O. Hathaway, Superintendent of the Arizona State Highway Patrol, and the testimony of another State employee claimed to be a witness to the acts surrounding the arrest of the petitioner. Certainly the petitioner had ample opportunity to tell his side of the story during the trial, either before the jury or in the absence of the jury. His failure to do so may not now be used as a stone in the foundation of his claim of violation of his constitutional rights justifying habeas corpus. *Stein v. New York,* 346 U.S. 156, 97 L.Ed. 1522 73 S.Ct. 1077; *Brown v. Allen,* supra. Perhaps counsel's reluctance to place the petitioner on the stand during the trial was a fear of the disclosure of the prior criminal record of the petitioner, including a conviction for a violent crime resulting in imprisonment in the petitentiary of the State of Texas.

If petitioner's counsel did exercise unsound judgment in his conduct of the case, that fact is not sufficient for habeas corpus. *Soulia v. O'Brien,* 94 F. Supp. 764; *Yodack v. United States,* 97 F. Supp. 307.

In reference to the claimed testimony of Mr. Hathaway, notwithstanding statements in petitioner's brief to the contrary, *the record does not show that this matter was ever presented to the District Court in any form at any time.* No mention of Mr. Hathaway was made in the Petition for Writ of Habeas Corpus filed

March 1, 1956, (TR --4) nor in Petitioner's Motion and Petition for Further Hearing filed March 8, 1956, (wherein all of the proposed witnesses were actually named with a brief statement of the connection of each with the case (TR 5-6) nor in Petitioner's Amended Petition for Writ of Habeas Corpus filed March 9, 1956, (TR 7-13). We challenge petitioner to support the statements in his brief by any part of the record before this Court. The same applies to the proposed testimony of the other State employee claimed to have been a witness. Certainly on certiorari this Court is not required to examine the decision of the lower Court on pleadings, facts or theories other than those which were before the lower Court, nor was the Circuit Court of Appeals authorized to do so. *Ow Tai Jung v. Haff,* (C.C.A. 9th), 89 F. 2d 329; *Ex parte Tsugio Miyazono,* (C.C.A. 9th), 53 F. 2d 172; *Seals v. Johnston,* (C.C.A. 9th), 95 F. 2d 501. Exhibits and affidavits not presented to the lower Court in habeas corpus proceeding could not be used on appeal to determine that trial Court erred in denying release. *Garrison v. Johnston,* (C.C.A. 9th), 104 F. 2d 128, certiorari denied 60 S.Ct. 107, 308 U.S. 553, 84 L.Ed. 465, rehearing denied 60 S.Ct. 137, 308 U.S. 636, 84 L.Ed. 529.

The record presented to and considered by the District Court would impel any reasonable mind to conclude that the events surrounding the arrest of the petitioner did not force, influence or coerce him into admitting the crime to Judge Frazier. The proof of the pudding is in the eating. The petitioner did not admit the crime at the time of his arrest. He continued to deny it when questioned by the County Attorney later the same evening. (See statement taken at County Attorney's home on March 17, 1953, at 7:00

P.M., marked State's Exhibit 52 for Identification, attached to the Response to the Application for Writ of Habeas Corpus presented to and considered by the District Court and the affidavit of the County Attorney (TR 18-19 - Appendix, pages 1 to 32.) The sole reason the petitioner was taken to and questioned at the home of the County Attorney was because that officer was confined to a hospital bed and was encased in a full-length body cast as a result of an accident (RT 2006-2008). The first time the petitioner admitted guilt was in the calm atmosphere and sanctity of open court. If he was in a state of fear at that time, it was from something that happened between 7:00 o'clock the previous evening when he denied guilt and 11:00 o'clock the next morning when he admitted guilt to Judge Frazier. He doesn't contend that anything of that nature occurred during that period. He was advised the previous evening by the County Attorney that no promises of leniency were being given and no threats were being made, and that he didn't have to talk to officers unless he wanted to. *Petitioner himself admitted that he understood his rights in that respect.*

(See Appendix, pages 3, 31).

A bare consideration of the various statements of petitioner himself, in chronological order, destroys any possible inference that the events surrounding his arrest forced, induced, influenced, coerced or brought about his confession to Justice of the Peace Frazier.

Please consider:

First — his statement, when the fire was discovered, and before the body of Mrs. Miskovich was found, that

he couldn't stand the smell of burning flesh (RT 969). He didn't confess or say who did murder the woman.

Second — after he had been discovered hiding in the brush by the officers, when he informed them that he did not kill the woman, but knew who did (RT 2121 and 2246). Although at this time a rope had been unfortunately thrown around him by irresponsible onlookers, and petitioner claims the Sheriff said "Will you tell the truth, or I will let them go ahead and do this", *he did not confess.* He then showed the officers the way to Cooper, whom he accused of killing the woman—a trick as dastardly as the murder itself. He attempted to put the blame on a seventeen-year-old boy, a boy whom the rest of his Negro companions in the barracks called "Baby John" (RT 2167), a boy proved innocent because he was asleep in his bed at the time of the murder, as testified to by a woman who was forced to be up that night with her sick child and knew his whereabouts (RT 1286, L. 8-12).

Third — when Cooper was arrested. He again pointed out Cooper as the murderer. This occurred while Cooper and petitioner were roped the second time (RT 2223), *but petitioner still did not confess.*

Fourth — on the evening of his arrest, hours after the roping. He was questioned by the County Attorney in Bisbee, but still insisted that Cooper was the guilty one. *He still did not confess.*

Fifth — when he was taken into open court the next morning and admitted he had killed the woman with a knife.

Can it be seriously contended that incidents surrounding his arrest caused him to confess? He maintained his original story that another committed the crime until after he was brought to the county seat; until after he was advised by the County Attorney that no leniency was promised and no threats were being made to induce him to tell what had happened; until after treatment of his wounded hand; until after a night of rest. *After all of this—in open court—he first confessed.*

The setting itself at the Justice Court bears mentioning. The Sheriff, unarmed, brought petitioner in and he sat down (RT 1995). No one even took notice of him. Other persons were there calmly transacting their business (RT 2076 and 2081). When their business was completed, the Justice of the Peace proceeded to explain the defendant's rights (RT 2075). It was after he was informed of his right to counsel that he volunteered: "I don't need any lawyer. I am guilty. I killed the woman". (RT 1881 and 2075). Facts supporting petitioner's claim that the confession was forced and coerced simply do not appear. *Brown v. Allen,* supra.

Petitioner's contention that, if one confession is stricken as being involuntary, all other confessions must be stricken, is not the law. *Kermeen v. State,* 17 Ariz. 263, 151 Pac. 738; *Lyons v. Oklahoma,* 322 U.S. 596, 88 L.Ed 1481, 64 S.Ct. 1208; *Malinski v. State of New York,* 324 U.S. 401, 89 L.Ed 1029, 65 S.Ct. 781; *Lisenba v. California,* 314 U.S. 219, 86 L.Ed. 166, 62 S.Ct. 280; *Stroble v. State of California,* 343 U.S. 181, 96 L.Ed. 872, 72 S.Ct. 599; *United States v. Bayer,* 331 U.S. 532, 91 L.Ed. 1654.

OTHER CONFESSIONS WERE REJECTED OUT OF AN OVER-ABUNDANCE OF CAUTION AND SHOULD HAVE BEEN ADMITTED AS VOLUNTARY.

Petitioner places great emphasis upon the fact that the trial court refused to admit into evidence additional confessions of the petitioner made on March 18th and March 20th as being involuntary. We submit that whether or not the trial Court was correct in excluding these confessions is still an open question as far as this Court is concerned. *Stroble v. California,* supra. There this Court examined the facts surrounding certain confessions, its decision having the effect of overruling the holding of the Supreme Court of California (*People v. Stroble,* 226 P. 2d 330) that a confession was involuntary. We submit that this Court may well do that here.

In line with the practice followed throughout the trial of "leaning over backwards" to show petitioner every possible consideration, the trial Court ruled out the later confessions although they could not have possibly been the product of the incidents surrounding petitioner's arrest.

Compare the following fact situation with those considered in the Stroble case and in the Lyons case.

Immediately after making his admission of guilt before Justice of the Peace Frazier, petitioner was taken to the home of the County Attorney where he was questioned by that officer in the presence of the Sheriff and a Deputy Sheriff. All proceedings were taken in shorthand by a young lady secretary attached to the Office of the County Attorney. Petitioner was again

advised of his rights not to make any statement if he didn't want to, and that no promises of leniency were being made nor were any threats (RT 1830-1831).

This statement was transcribed into typewritten form and was presented to petitioner on March 18th in the County Attorney's Office in the presence of Sheriff Howard, Deputy County Attorney Pidgeon and the young lady secretary, and Deputy Sheriff Haverty (RT 1859). The petitioner read the typewritten statement and signed it (RT 1860-1861). At that time no promises of leniency were made, no threats were made and no force was used to secure his signature (RT 1861).

On March 20th petitioner was again questioned by the County Attorney in the presence of the County Attorney, his two deputies, Under-Sheriff McRae, Deputy Sheriff Haverty, and official Court Reporter Neff. Also present was Percy Bowden, who was, and had been for thirty years, Chief of Police of the City of Douglas and who also was at the time an official Deputy United States Marshal (RT 1889). Neither Sheriff Howard nor any person present at the apprehension or arrest of the petitioner was present. All proceedings were taken by official Court Reporter Neff, who later transcribed them into typewritten form. Again no promises of leniency were made, nor were any threats made, nor was any force used to induce the petitioner to talk (RT 1891). During the questioning, petitioner voluntarily and willingly came over to where the County Attorney was lying on a hospital stretcher and illustrated his testimony on a plat or map with different colored crayons (RT 1892).

After this statement was transcribed into typewritten form, Percy Bowden, not a member of the Sheriff's Office but the Chief of Police of the City of Douglas and a Deputy United States Marshal, interviewed petitioner in the County Jail on April 1st in the fingerprint-room with only the two of them present (RT 1892). This officer told petitioner to read each one of the pages of his confession and, if it was true, to initial it, and, if it wasn't true, not to initial it. Petitioner proceeded to do just that and initialed each and every page, and did not refuse or fail to initial any page (RT 1893). This procedure of reading and initialing was not a hurried affair but consumed approximately an hour (RT 1893 and 1897). No promises of leniency were made to him, no threats were made to him, and no force was used (RT 1893). Petitioner signed his name in full on the last page (RT 1894). Petitioner knew that Bowden was a Chief of Police and a Deputy United States Marshal (RT 1893).

It is significant that, although petitioner complained to this Federal Officer about the pain in his cut hand, he said nothing whatsoever about any injury to his neck, nor did he say one word relative to the incidents surrounding his apprehension and arrest (RT 1899-1900).

Counsel for petitioner has complained bitterly of the actions of this Federal Officer as above described in the Superior Court of the State of Arizona, in the Supreme Court of the State of Arizona, in the Federal District Court, in the Circuit Court of Appeals and in this Court, but has yet to cite one authority holding that such action was illegal, improper or subject to any criticism whatsoever. On the other hand, considerable

authority exists in favor of the propriety of such action. (See *People v. Nelson,* 320 Ill. 273, 150 N.E. 686; *People v. Aguilar,* 140 Cal. App. 78, 35 P. 2d 137).

A well-reasoned case directly in point is *O'Loughlin v. People,* 90 Colo. 368, 10 P. 2d 543. There the Court allowed into evidence a statement secured by officers three weeks after the homicide was committed and after defendant's counsel had actually cautioned her not to talk. In *Stroble v. California,* supra, it also appears that certain of the subsequent confessions admitted into evidence were secured after counsel was appointed for the defendant.

In addition, in the case at bar, it appears that general counsel for petitioner had not been appointed, the Honorable W. Edward Morgan having received only a limited appointment from the trial Court on the 21st day of March, 1953, as follows:

> "THE COURT: Mr. Morgan, you represent the defendant in this arraignment?
>
> MR MORGAN: For the purpose of this arraignment, if I may be appointed by the Court, Your Honor.
>
> THE COURT: Do you have any money to employ counsel of your own choice?
>
> MR. THOMAS: No, sir.
>
> THE COURT: For that purpose the Court will appoint Mr. Morgan for the purpose of this arraignment. What are your initials, Mr. Morgan?"

(See certified copy of Reporter's Transcript attached to and made a part of the Appellee's Brief in *State of Arizona v. Arthur Thomas,* 275 P. 2d 408.)

We submit that the above undisputed factual situation supports the conclusion that the rejected confessions were actually voluntary in nature much more than does the factual situation in the *Lyons* case. The *Stroble* case is quite similar to the case at bar. In neither case did the petitioner suggest that the action of any officer during the actual taking of the confession was accompanied by force or duress. In each case it was contended that incidents prior to the taking of the confessions rendered them inadmissible. In the *Stroble* case the admitted physical abuse took place in the park foreman's office, only a short time before the confession was made, approximately an hour. Here any physical abuse of the petitioner, if in fact there was such abuse, occurred on March 17th, while the first rejected confession was taken on March 18th, and the second was taken on March 20th, which was reaffirmed in the presence of the Federal Officer on April 1st.

In neither case does it appear that the physical acts were accompanied by any demand that petitioner implicate himself. In the case at bar, even if the testimony concerning the Sheriff is taken in its strongest light in favor of petitioner, the most that can be made of it is that petitioner was urged to tell the truth, the Sheriff allegedly saying to him "Will you tell the truth, or will I let them go ahead and do this" (RT 2327).

In each case the petitioner readily and willingly answered questions in the prosecutor's office, and certainly the setting in the Cochise County Attorney's Office was less vulnerable to the charge of pressure than was the setting in the District Attorney's Office in California, where nineteen officers and five stenographers formed the interrogation team. (See *People v. Stroble,* 226 P. 2d 330, page 335).

In each case the record shows that the petitioner was anxious to confess to anybody who would listen, and as much so after he had consulted with counsel as before.

In each case it appears that petitioner's willingness to confess to the doctors in the *Stroble* case and to the federal officer in the case at bar, and in circumstances free of coercion, suggests strongly that each petitioner had concluded quite independently of any duress by the officers "that it was wise to make a clean breast of his guilt".

We would point out another significant fact in this connection. Nowhere in any court which has considered this matter has petitioner himself signed any affidavit as to his state of mind during the time the confessions were being given in support of his counsel's bare conclusions, nor has he himself verified any of the charges that his counsel continues to make.

We submit that the language of this Court used in the *Stroble* case fits the case at bar like a glove (to the same degree that the cuts on the gloves found near petitioner's house fit the cuts on petitioner's fingers):

> "In the light of all these circumstances we are unable to say that the petitioner's confession in the district attorneys' office was the result of coercion, either physical or psychological."

PETITIONER'S COMPLAINT OF NOT BEING TAKEN BEFORE MAGISTRATE IS FRIVOLOUS UNDER CIRCUMSTANCES.

Petitioner complains that he was not taken promptly to a committing magistrate and that he was taken

to a mortuary where he viewed the remains of the deceased. The truth is he was taken approximately fifteen miles north to Willcox to the nearest justice of the peace, who could not be located as he was out of town driving a school bus (RT 2227 and 1987); that the Sheriff then went by the mortuary and viewed the deceased (id.); that the petitioner was there for only two minutes (RT 2228); that he was not close to the body (RT 1987); and that another member of the Sheriff's party took photographs of the deceased as part of the investigation (RT 2316).

Petitioner was then taken to Bisbee, in an adjoining justice precinct, arriving there after the Justice Court was closed. He was taken before Justice of the Peace Frazier, sitting as a magistrate, the next morning, at which time he orally confessed.

This is not a case such as *Mallory v. United States,* 354 U.S. 449, 1 L.Ed. 2d 1479, 77 S.Ct. 1356, where a confession was secured from a defendant prior to his being taken to a magistrate. In the case at bar the confession complained of was not prior to being taken before a magistrate; it was made while he was appearing in the very court of the magistrate. The fact that the magistrate was not called to his office after closing hours is not an unusual practice in Arizona; and, since petitioner does not even contend that anything of an unusual nature occurred between the time he reached Bisbee and his appearance in the magistrate's court, such delay is of no special significance. See *State v. Jordan,* decided by the Arizona Supreme Court on January 14, 1958, (Pima County), in which is cited *Hightower v. State of Arizona,* 62 Ariz. 351, 158 P. 2d 156 (Maricopa County). Further, the Arizona rule seems to

be in accord with the decisions of this Court. *Gallegos v. State of Nebraska,* 342 U.S. 55, 96 L.Ed. 86, 72 S.Ct. 141.

DENIAL OF HATHAWAY ORDER NOT NECESSARY SINCE IT WAS NEVER ALLEGED IN DISTRICT COURT

The petitioner charges (Pages 15 and 16 of Petitioner's Brief) that nowhere in the record has the respondent denied:

1. That the Superintendent of the State Highway Patrol ordered the witness Selchow not to discuss the case with the petitioner or his counsel and only to respond to a subpoena of a duly constituted court and to only give testimony under oath at the trial.

2. That no process exists by which the petitioner could get a subpoena issued for the taking of the testimony of Selchow prior to the trial.

3. That the petitioner did not know what Harry Selchow would or would not testify to if called as a witness.

Since there are simply no allegations, either sworn to or unsworn to, in the pleadings filed by the petitioner in the District Court relative to the above points, there was no necessity of any denial by the respondent. Had there been any such allegations, they certainly would have been denied.

Apparently this mythical Hathaway order is an afterthought bred, born and reared after the District Court's decision.

MANY OF PETITIONER'S STATEMENTS OF FACTS ARE INCORRECT AND IRRESPONSIBLE AND NOT SUPPORTED BY THE RECORD

Petitioner's Brief is replete with statements of purported facts which are incorrect and are not supported by the record. As an example of such irresponsible assertions, we call the Court's attention to the following and challenge the petitioner to support his statements by the record:

1. That the petitioner is an ignorant cotton-picker.

2. That the community in which he lived was a predominantly Southern community, a community which still exercises Jim Crow practices.

3. That Sheriff Howard said "If you don't tell them you did it, I will let them hang you".

4. That another Negro was "dragged".

5. That Thomas and the other Negro were "dragged".

6. That the County Attorney advised witnesses called by the defense that they were to refuse to testify on the ground of self-incrimination.

7. That the petitioner was an ignorant farmhand.

8. That he had no friends or relatives to aid him.

9. That the trial Court refused to allow the petitioner to put on any more evidence concerning petitioner's putative lynching.

10. That petitioner had no friends, no attorney, no funds.

11. That the Sheriff threatened the petitioner that he either admit that he had committed the crime or he, the Sheriff, would let the mob go ahead and finish their roping of him.

12. That petitioner was alone without friends or counsel in the jail.

13. That petitioner was besieged for a confession in his jail cell even after counsel had been appointed for him, and was still so afraid that even the trial Court held that the confession obtained nearly a month after his arrest was involuntary as being still under coercion.

It seems unlikely that a person with a legitimate complaint would deem it necessary to resort to such practices. However, petitioner followed this course in both the District Court and the Circuit Court.

PETITIONER WAS OF AVERAGE INTELLIGENCE, AND NO STRANGER TO THE CRIMINAL LAW

It must be remembered that petitioner was no uneducated, weak-minded, young colored boy, as was the petitioner in *Fikes v. Alabama*, 250 U.S. 191, 1 L.Ed. 2d 246, 77 S.Ct. 281. He was twenty-seven years old; his education had actually progressed to the high-school level; he was of normal mentality and had had considerable experience with the criminal law from the time he was a juvenile and served over a year in the Gainsville Penitentiary in Texas; got into an altercation involving a gun in Conroe, Texas; was confined

to the brig once in 1942 and another time in 1946 during his term in the United States Navy; served fourteen days in 1947 for shooting dice; served fourteen months of a five-year sentence for stealing money in Sugar Land, Texas, (Pages 1, 14, 15, 16 and 17 of State's Exhibit 52 for Identification attached to the Memorandum and Affidavit in Opposition to Petition for Writ of Habeas Corpus, filed March 9, 1956, in the District Court.) (Appendix, pages 2, 21-25)

THE FEDERAL DISTRICT COURT DID NOT ERR IN CONSIDERING THE DOCTRINE ANNUNCIATED IN THE STEIN CASE AS WELL AS THE DOCTRINE IN THE LEYRA CASE

There is nothing in the record before this Court even indicating that the decision of the Federal District Court was based on the *Stein* case. The Court simply mentioned the matter in explanation of certain statements he had made when the application was first presented to him. Actually, the decisions in the two cases are not inconsistent. In the *Stein* case, as in the case at bar, the question of whether the confession was obtained by coercion was disputed. In the *Stein* case, it was disputed to the extend that the police denied any coercion whatsoever; the defendants did not testify to the contrary, although, after arraignment, injuries and bruises were found on their bodies. In that case the question of coercion was submitted to the jury under proper instructions as it was in the case at bar. On the other hand, in the *Leyra* case (*Leyra v. Demmo*, 347 U.S. 556, 74 S.Ct. 716) it was conceded that the first confession obtained by a State-employed psychiatrist was tainted by coercion and the only question was whether this defect extended to confessions

immediately following the first confession. In the *Stein* case there was sufficient evidence apart from the confession to support the verdict of guilty, as there is in the case at bar, while in the *Leyra* case it does not appear whether there was sufficient other evidence or not. In the case at bar a mere recital of the facts as found by the Supreme Court of Arizona (275 P. 2d 408) shows conclusively that there is ample evidence to sustain a conviction without the consideration of the confession to Judge Frazier. The facts in the *Leyra* case fully explain the decision. There a trained psychiatrist and hypnotist was introduced to a tired and ailing defendant as a medical doctor. This expert immediately began questioning which led to an admission of guilt. The defendant was asked leading questions, was given suggestions and was promised leniency. A police captain, who had been listening in an adjoining room, was called in immediately and continued to question the defendant, as did a business partner of the defendant. This Court held that a formal confession taken by two assistant state prosecutors immediately after this was coerced. This Court did not overrule the *Stein* case, did not even discuss it, and nowhere used language in the opinion at variance with the holding in the *Stein* case.

The most that can be said of the testimony of the witness Selchow is that it raised a conflict in the evidence. It is the only evidence that even hints that the Sheriff participated in the roping incidents to any degree. All other witnesses testified that the Sheriff did protect his prisoners. It is undisputed that he told the ropers to desist from their actions on each occasion, that he freed his prisoners from the rope, and that petitioner agreed in the presence of the newspaper

reporter that the Sheriff had "saved his life" (RT 1945). Selchow himself weakened on cross-examination and agreed that it was possible that he was mistaken in his belief that the Sheriff was the person who told the petitioner to tell the truth "or I will let them go ahead and use this" (RT 2330), due to the fact quite a few of the men were talking and it was difficult to single any one out.

Any conflict created by the testimony of Selchow simply brings the case at bar within the framework of the *Stein* case rather than the *Leyra* case.

The petitioner cites, as an excuse for not calling the witness Selchow prior to the admission of the oral confession, that the Court refused to allow the defense to introduce more evidence concerning the roping incident, notwithstanding the true fact that the Court informed counsel (RT 2067) at that time that he was "steward of your own case" and was to do as he saw fit. When objection was made to further testimony in the absence of the jury, *counsel for petitioner agreed that the objection was well taken* (RT 2069) and never even attempted to call the witness Selchow for testimony at that time. Under the circumstances he may not now complain.

PETITIONER WAIVED ANY OBJECTION TO THE ADMISSION OF THE CONFESSION BY FAILING TO OBJECT IN THE TRIAL COURT ON THE GROUND URGED HERE

When the matter was first gone into during the appearance of Justice of the Peace Frazier on the witness stand in the absence of the jury, (RT 1880-1881) no objection whatsoever was made. When the Justice

of the Peace was later placed on the witness stand in the presence of the jury, the only objection made was that the defendant had not been advised of his rights at the preliminary hearing, counsel for defendant citinf the Fourth Amendment to the Constitution of the United States, and Article 2, Sections 8 and 10 of the Constitution of Arizona, and "The Fifth Amendment". (RT 2073-2074).

Nowhere did counsel for petitioner object upon the ground urged in this Court. By failing to object on the ground urged in this Court, the petitioner has waived his rights to raise the question. *Sullivan v. State*, 47 Ariz. 224, 55 P. 2d 312.

The federal rule appears to be the same. *Hawkins v. United States*, (U.S.C.A. C.C.) 158 F. 2d 652; *Metcalf v. United States*, (U.S.C.A. 6th Circuit) 195 F. 2d 213; *Greer v. United States*, (U.S.C.A. 8th Circuit) 240 Fed. 320; *Stein v. New York*, supra.

Further, after objecting on an improper ground and on a different ground than urged before this Court, counsel for petitioner went ahead and cross-examined the Justice of the Peace and himself elicited the details of further statements made by the petitioner to the Justice of the Peace much more damaging than the statements objected to (RT 2083, lines 4-17).

IF THE CONFESSION OBJECTED TO HAD NOT BEEN ADMITTED THE JURY WOULD STILL HAVE KNOWN OF THE EXISTENCE OF A CONFESSION

Even if the testimony of Justice of the Peace Frazier had not been admitted, the jury would still have

known that petitioner had made a confession, as his own counsel told them so in open Court. (RT 1916, lines 2-6). Nowhere does the record show that counsel for petitioner moved to strike this from the record, nor did he move that the Court instruct the jury to disregard the statement. The only time the matter came up again was in the absence of the jury (RT 1920, lines 13-21). By reason of this, the jury took with them the definite knowledge that petitioner had confessed to the murder. Since, in point of time, this was prior to the testimony of Justice of the Peace Frazier, he added little to what they already knew.

SUMMARY OF ARGUMENT

Since petitioner did not file his Application for Writ of Certiorari within the time allowed by law and the rules of this Court, this Court has no jurisdiction to consider the first question presented by petitioner.

Under the rule in *Brown v. Allen,* supra, the Federal District Court was justified in denying petitioner's Application for Writ of Habeas Corpus without ordering a hearing.

The confessions given by petitioner after the one admitted in evidence were actually voluntary in nature, should have been admitted, and were rejected only because the trial Court was overly cautious in his efforts to protect the rights of petitioner.

Petitioner may not complain of not being taken before a magistrate before the confession admitted in evidence was given by him, since this confession itself was given by petitioner while appearing before the magistrate.

Neither this Court nor the Circuit Court was required to, or in fact authorized to, consider statements of factual matters contained in petitioner's brief before this Court which were not alleged in pleadings filed in the District Court and which the record shows were not otherwise presented to the District Court.

The record shows that innumerable conclusions and purported statements of fact contained in petitioner's brief are incorrect and are not supported by the record.

The record shows that petitioner was twenty-seven years old, of average high school education, and had served a considerable period of time in the United States Navy, and should have been familiar with criminal law and criminal process by virtue of his experience as a juvenile delinquent and his conviction of serious offenses for which he served periods of imprisonment.

The facts of this case bring it within the framework of the Stein case, the Lyons case and other cases in that group.

Petitioner may not claim in this Court that his rights under the Fourteenth Amendment have been violated when he did not make that objection in the lower Court prior to the admission of the confession, but there relied on rights defined by other constitutional provisions, both state and federal.

Prior to the time the confession was admitted to evidence, the jury knew that petitioner had confessed, because his own counsel told him so in open Court and at no time moved that the trial Court instruct the jury to disregard such statement.

CONCLUSION

Corrective power of this Court over state courts in criminal cases is narrower than that which it exercises over the lower federal courts. *Watts v. Indiana,* 338 U.S. 49, 50, 93 L.Ed. 1801, 69 S.Ct. 1347, 1357.

The respondent also believes that the following thought from *Stein v. New York,* supra, should be ever kept in mind:

> "We are not willing to discredit constitutional doctrines for protection of the innocent by making of them mere technical loopholes for the escape of the guilty. The petitioners have had fair trial and fair review. The people of the state are also entitled to due process of law."

This has been stated in another way by Mr. Justice Cardoza in *Snyder v. Massachusetts,* 291 U.S. 97, 78 L.Ed. 67:

> " 'But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.' . . .
>
> " 'There is danger that the criminal law will be brought into contempt — that discredit will even touch the great immunities assured by the Fourteenth Amendment — if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

We respectfully submit the judgment of the United States Court of Appeals for the Ninth Circuit be affirmed.

ROBERT MORRISON
The Attorney General

JAMES H. GREEN, JR.
Chief Assistant Attorney General

WESLEY E. POLLEY
Special Assistant Attorney General

LLOYD C. HELM
Cochise County Attorney

JOHN G. PIDGEON
Chief Deputy County Attorney

Appendix

STATEMENT OF ARTHUR THOMAS

taken in Mr. Wesley E. Polley's home in Warren, Arizona, on the 17th day of March, 1952, at 7:00 o'clock p.m.

PRESENT:

Mr. Wesley E. Polley
Mr. Lloyd Helm
Mr. John Pidgeon
Mr. Jack Howard
Mr. V. McRae
Mr. William Saunders
Mr. Arthur Thomas
Mr. L. B. Neff, Reporter.

MR. POLLEY: Q What is your full name?
A Arthur Thomas, Jr.

Q Arthur Thomas, Jr.?

A Yes.

Q And how old are you?

A Twenty-seven.

Q How long have you been in Arizona?

A I came to Arizona in November.

Q Of last year?

A Yes.

Q And what are you doing for a living?

A I have been doing farm work, picking cotton and picking maize, and I worked for a fellow over there, Mr. Delbert.

Q Where did you come from?

A Came from Conroe, Texas.

Q Were you born in Texas?

A Yes, in Beaumont.

Q Did you go to school at all?

A Yes.

Q How far?

A I got in high school.

Q And how old did you say you were?

A Twenty-seven.

Q Now you know that I am the County Attorney of this county here, and all of these gentlemen around here are either Deputy Sheriffs or Deputy County Attorneys. I want to ask you about this occurrence in Kansas Settlement. I am not going to make you any promises if you do talk to me, and I am not going to make any threats if you don't talk to me. Whatever I ask you I want you to tell me freely, and I want you to tell me the truth.

How long have you known this Cooper boy?

A The first time I saw him was in '51.

Q Was he here in Arizona before you came or —

A No, sir, we came together.

Q Are you married?

A Yes, sir.

Q Is he married?

A No, sir.

Q When was it that you first came to the community over there called Kansas Settlement?

A That was in November, too.

Q When was it that you first saw Mrs. Miskovich?

A It was in November.

Q Was she running the store there at that time?

A Yes.

Q How far does this Cooper boy live from you?

A We both stay in the same place. We stay in this army barracks, and the fellow let us stay there because we was working for him.

Q Then you and Cooper actually live in the same house, is that right?

A Yes, sir.

Q And how far was this house from the Miskovich store?

A I would say it is about a quarter of a mile, maybe a little better.

Q When did you first see Cooper yesterday?

A I saw him all day yesterday excusing yesterday morning when I was working and he was at home then. He wasn't working yesterday morning.

Q Well, did you see him yesterday afternoon?

A Yes, sir. I wasn't working. It rained and we didn't get to work.

Q And where did you see him?

A At home.

Q Did you go down to the Miskovich store at all?

A Yes, sir.

Q When?

A I went down there yesterday, and then me and him went down last night together.

Q About what time did the two of you go down there last night?

A It was about — I would estimate about 7:30, 8:00 o'clock.

Q Did she ordinarily stay open, keep the store open at night?

A No, sir.

Q Well, was the store open last night when you went down there?

A No, sir.

Q Did you get in the store?

A Yes, sir. I got in after I heard her holler. I went around the back the way he went in. I went around and grabbed him, tried to take the knife away from him. That is where I got my fingers cut.

Q Let's take this a step at a time. How did you get from your place to the store? In an automobile.

A No, sir. Walked.

Q The two of you walked down there?

A Yes.

Q And as you got to the store, did you stay with Cooper all the time, or did he go around the back and you stay in front?

A No, sir. I stayed right out in front at first.

Q Was there any discussion between you as to what you were going to do at the store?

A He told me he been going down there late and getting beer, late after the store been closed, and that

is what we were supposed to be down there for, and he told me, "You stand there at the front there and I will go around in back and see if she will let me have some beer."

And I told him, "All right." And I was standing there and I heard her scream.

Q Did you hear her scream after he walked around the back?

A Yes, sir.

Q And after you heard her scream did you go around the back?

A I went around the back.

Q And how did you get in?

A She had the door open.

Q The back door?

A Yes, sir.

Q What was Cooper doing at that time?

A He had a knife in his hand, a long knife, and he had it drawed back, and I grabbed his hand up by the handle of the knife, and when he jerked down this way the knife slipped out of my grip.

Q What kind of a knife was it?

A It was a butcher knife.

Q Where did he get it?

A I don't know, sir.

Q Did he have it when he walked down to the store with you?

A No, sir, never been a knife like that in the house up where we was staying.

Q Would you know the knife again if you saw it?

A Yes.

Q Is this it? (Indicating.)

A Yes. If that is not it, it is one just like it.

Q In other words, this knife that I am holding in my hand looks like the knife that Cooper had?

A Yes, sir.

Q Well, when you first went in was he trying to stab her with the knife?

A Yes. He was standing up over her. She was laying on the bed then. He was standing up over her, and had the knife drawed back. He might have stabbed her before then, but he had the knife drawed back, and I asked him what was he doing. He told me to get out, so I grabbed him then, and tried to take the knife away from him, and he cut me then.

Q Well, what part of the knife did you grab?

A I had hold to the handle part at first, right up to the handle. He had the handle and I caught right up over his hand and part of the handle, and tried to hold it, but he jerked up on it and knocked my grip loose there and the knife just came right up and cut my finger.

Q Were you able to get the knife away from him?

A No, sir, I didn't get the knife away from him.

Q Did you actually see him stab her with the knife?

A No, sir, I didn't actually see him stab her with the knife.

Q Did you see any blood coming from her?

A Yes, sir.

Q And where was it coming from?

A It seemed like it was coming out of her mouth. Mouth, I would say, because I had taken a quick look at her and tussled with him then. After he cut me I run then. I run to the house to get me something. I thought maybe he had gone crazy, and I went across the field. I didn't go the way we came.

Q How did he leave, do you know?

A No, sir. I went on in front of him. After he cut me, I left. It was about thirty minutes later when he came to the house.

Q What did he say then?

A He didn't say nothing.

Q Didn't you ask him about what had occurred?

A Yes, sir, when I talked to him, but he wouldn't say nothing.

Q He wasn't drunk, was he?

A No, sir, I wouldn't say he was drunk, because he hadn't been drinking over two cans of beer.

Q About when did he drink those two cans of beer?

A About 5:30 or 6:00.

Q Did you have anything to drink?

A Yes, sir.

Q What did you have to drink?

A Me and another boy had a little drink of wine, and that was all.

Q About what time?

A About the same time; about 5:30, 6:00 o'clock.

Q When you say, "a little drink of wine," what do you mean? About how much did you have?

A It wasn't quite a half pint in a fifth bottle. Just a little bit in there, and me and him drank it up.

Q Would you state that it was a quarter of a pint?

A Yes, I would say it was a quarter of a pint.

Q But in any event when you and Cooper got down to the store you weren't drunk in any way, were you?

A No sir.

Q You knew what you were doing?

A Yes, sir.

Q And so far as you know he knew what he was doing?

A Yes, sir.

Q How long was he in the store when you heard the scream?

A About five of six minutes.

Q Now this back door, did it open into the storeroom, or did she have a little bedroom there or something?

A Yes, sir, that is what is was. She had a little bedroom in the back, and when you go from the back to the front it don't have no door there, just blinds.

Q When you first saw her then, she was on the bed?

A Yes.

Q And he was standing over the top of her?

A Yes, he was standing over her with the knife drawed back.

Q And that was the knife that I have just shown you?

A Yes, or it was one just like it if it wasn't it.

Q Did you see any blood coming from the front of her? Her chest?

A Well, it looked like it was coming from the mouth. I didn't see none from the chest.

Q Well, do you mean to tell me that you walked in there after she screamed?

Yes, sir. I ran in there. I didn't walk in. I ran in. I ran all the way from around to the front, and ran in the back door there.

Q And when you ran in, Cooper was over the top of her with this big butcher knife?

A Yes.

Q And you tried to get it away from him?

A He wasn't on the bed. She was on the bed and he was standing up beside the bed.

Q That is right, but he was trying to stab her with the butcher knife?

A Yes.

Q And you tried to take the knife away from him?

A Yes.

Q But you couldn't take the knife away from him?

A No, sir.

Q And then you ran?

A Yes.

Q But you left her to be killed by him?

A I didn't think he was going to kill her or anything like that.

Q What did you think he was doing with the butcher knife about a foot long?

A It didn't occur to me what would happen.

Q And then you say you cut across the field and went home, is that right?

A Yes.

Q And it was about a half hour before he came home?

A Yes, sir, after I got home. About a half hour.

Q And when he came in you tried to talk to him?

A I tried to talk to him, asked him what was he doing, and what was he standing up over her with the knife for. I asked him, "How come the blood was coming from her mouth?"

Q What did he say?

A He told me he didn't want to talk to me. He didn't have nothing to say. So I didn't say nothing else to him until today at dinner.

Q About what time was it when the two of you were talking in your house?

A In the house? It was pretty close—it was pretty clos to 9:00 o'clock, if it wasn't 9:00. It might have been a little after 9:00. We haven't got no clock in the house.

Q What did you do? Go to bed?

A Yes, sir. I went to bed.

Q You never did get any satisfaction out of him as to why he had the knife and why the blood was running out of her mouth?

A No, sir, I didn't say nothing else to him.

Q Did you get up this morning?

A Yes, sir. I never did go to sleep. I was laying across the house.

Q Who all lives in that house?

A Cooper, a boy named Davis, and another lady, and a fellow named James Lewis and my wife and myself; six of us.

Q Where did you eat breakfast this morning?

A I ate breakfast at home, sir.

Q Where did Cooper eat breakfast?

A At home.

Q With you?

A No, sir. This other lady there, she cooks for Cooper and those other two boys, and my wife cooks for me.

Q Did you talk to Cooper about this any more from the time you got up and ate breakfast this morning until noon?

A No, sir, I didn't say nothing to him.

Q After you got through eating breakfast, where did you go?

A I went to work.

Q You went to work?

A Yes, sir.

Q Where?

A I was working out there for a lady that bought a farm. That bought a farm. Miss Beard. She came from Texas.

Q Miss who?

A Miss Beard.

Q How do you spell that?

A I don't know how to spell it.

Q Was Cooper working in the same place?

A No, sir. He was working for a fellow, T-Bone Ranch. I don't know who he was — owns it.

Q After breakfast, when did you next see Cooper?

A At lunch time. He was eating dinner.

Q Where were you having dinner?

A At home.

Q At home? Did you say anything to Cooper then about what happened last night?

A No, sir. I just asked him one thing. Asked him if he was going back to work, and he said "yes." And he got up and left and went back to work.

Q You never asked him any more about what happened last night?

A No sir; I was intending to get him off by himself and ask him, but every time I said anything to him he brushed me off and I never had a chance to say nothing to him.

Q What did you do?

A After he left after dinner?

Q Yes.

A My wife told me she was feeling bad. She was pregnant and I said, "I am going down to Max' and get his truck to take you to town." And I said, "While I am up there I will have my hand fixed up."

She said, "All right," so I left and I started down that road going down to his house, and when I got down by Mr. Kempsons place—he has got a big farm. I usually cut across the woods there to Max' house, and I was going across there, it is mesquite bushes there, and when I got started out there I saw—looked up and saw a fellow with a gun and a dog, and I tried to hide then.

Q Why?

A Because I was scared. To tell you the truth, I was scared.

Q What were you scared of?

A I don't know, see, because one thing I was scared of being killed for something I didn't do, and all of that.

Q What do you mean, for something you didn't do?

A I knew what it was all about when I saw them coming.

Q You knew that those officers were out there and that dog was out there as a result of what happened

to Mrs. Miskovich last night, didn't you?

A Yes, sir.

Q And when you realized that you got scared, didn't you?

A Yes, sir.

Q And you tried to hide, didn't you?

A Yes, sir, I tried to hide.

Q And if they hadn't looked in that particular bunch of tumble weeds and brush you would have got away, wouldn't you?

A No, sir. I was going to Max'. That was all the further I was going.

Q Why did you try to hide from the officers?

A I didn't know whether they was officers or not. I was just scared. I couldn't see their badges.

Q You saw the guns, didn't you?

A Yes, sir.

Q How close were you to them?

A When I first saw them I was about a block and a half off, when I saw them.

Q But you could see their guns?

A Yes, sir.

Q And you could see the dog?

A Yes, sir.

Q You knew they were hunting you, didn't you?

A I didn't know exactly they was hunting me, but I knew they was hunting somebody.

Q When did you first find out that Mrs. Miskovich was dead?

A Well, it was this morning. I was over there and a lady came up in a car and said the store was on fire, "would you all come down and help me put it out?" And me and these two fellows there I was working with, we got in the car with her and went down there. That is when I found out she was dead.

Q You went back to the store this morning?

A Yes, sir.

Q And was the place on fire?

A Yes, sir.

Q And did you see the body then?

A No, sir, I never did look on the inside.

Q When you first found out she was dead you knew what killed her, didn't you?

A Yes, sir. I had an idea what killed her. That is what I wanted to talk to him about. I was going to tell him if he didn't go up and tell the police I was going to the police myself.

Q About what time was it you went to the store this morning?

A It was about ten after ten.

Q Ten after ten?

A Yes.

Q And you knew that she had been killed at ten after ten this morning?

A Yes, sir, I knew she was killed then.

Q And you knew in your own heart what had killed her. That is, that Cooper had killed her the night before, didn't you?

A Yes, sir, that is what I was thinking.

Q But you didn't report it to anybody?

A No, sir, I was scared.

Q That you were going to talk to him about it at noon, but then you didn't talk to him, is that right?

A Yes, sir, I did, but he wouldn't talk with me.

Q Now you say he wouldn't talk to you about it at noon. You just tell me what you said to him.

A No, sir. I asked him, I said, we all called him Baby John. We don't call him Cooper. I said, "John are you going back to work?"

He said, "What do you care? You just watch me and see." And he got on the trailer and went back to work.

Q That is all you said to him about the killing of Mrs. Miskovich?

A No, sir. I told him I wanted to talk to him.

Q I want you to tell me exactly what you said to him.

A I asked him was he going to work then. He asked me, just watch him and see what he would do. I told him I want to talk, and he went on outside then and got on the trailer and went on back to work.

Q And you still didn't report it to anybody?

A No, sir, I didn't say nothing.

Q All right. Now see these shoes over here?

A Yes, sir.

Q Whose shoes are those?

A Those are my shoes.

Q All right. The officer found them under your bed this morning, didn't he?

A Yes, sir. Well, I guess it was this morning. I thought it was this evening.

Q Well, sometime today he found the shoes?

A Yes, sir.

Q All right. Now who wore those shoes last night?

A I didn't even have on those shoes last night? I put them on yesterday after it was raining and got cement on them and put them in the kitchen. When I got up this morning I put them on when I first got up this morning, and this hand was still bleeding when I put them on.

Q What shoes did you wear last night?

A I haven't got them now.

Q All right. Where are they now?

A I don't know where they is.

Q Well, now I want you to tell me the truth.

A Yes, sir.

Q Now didn't you tell the sheriff that Cooper wore those shoes last night?

A Yes, sir. I knew he had wore them after I looked at them. I knew he had wore them.

Q Then Cooper wore those shoes last night, didn't he?

A Yes, sir.

Q And he wore those shoes down to the store when the two of you went down there, didn't he?

A No, sir, he didn't have them on then. I had them on then, when we went to the store the last time, but he had them on before then. I put them on after we came back to the house.

Q All right. But the time you went to the store, 7:30 or 8:00 o'clock, these shoes right here you had on, didn't you?

A Yes, sir, I had them on.

Q And at the time that you were wrestling with Cooper over this knife, you had those shoes on, didn't you?

A I had the shoes on, yes.

Q And when you left the place and ran across the field, you had those shoes on, didn't you?

A Yes, sir, I had shoes on.

Q Have you ever been in trouble before?

A Yes, sir, I have been in Gainesville.

Q What for?

A I went to Gainesville for stealing.

Q What kind of a sentence did you get?

A No, sir, I was just a juvenile then.

Q That is not a juvenile prison. That is a prison. What were you charged with, stealing something?

A Yes, sir.

Q What was it?

A It was some money.

Q How much?

A About $30.00.

Q How much?

A About $30.00.

Q And when was this?

A In 1940.

Q And what sentence did you get? What term did the Judge say you had to serve?

A No, sir. Well, I can't say. He just said, "I sen-

tence you to the State Training School for Boys," and I stayed down there one year and three days.

Q Have you ever been in any other trouble?

A Yes, sir. I got a little mixed up here in a little trouble back a while ago over a pistol.

Q Where?

A At home. In Conroe.

Q How do you spell that?

A C-o-n-r-o-e.

Q In Texas?

A Yes, sir.

Q Where is that?

A That is about 35 miles north of Houston.

Q Did you serve any time over that?

A No, sir.

Q Well, what happened? I mean, I don't mean what happened when you got in trouble, but what was the result of your court action?

A Well, see, the way it was me and a fellow was having a fight and he drew the pistol, and I taken it away from him, and I carried it to an officer and gave it to the police officer. When they taken it to trial they didn't have no court action against me at all.

Q You didn't serve any time that time at all?

A No, sir.

Q Any other time?

A No, sir.

Q Now I want to be fair with you. We are going to send your fingerprints off to the F.B.I. so we are going to get your record and there is no way of your getting out of it, so you may as well tell me everything.

A Yes, sir.

Q What other times have you been in trouble?

A I went to the brig twice while I was in the navy.

Q When was that?

A I went the first time in '42. The last time in '46.

Q For what?

A I was AWOL then.

Q Both times?

A Yes, sir.

Q What other times have you served jail sentences?

A I served one jail sentence in '46—'47 it was. It wasn't '46.

Q Where?

A In Conroe.

Q For doing what?

A Shooting dice.

Q Shooting dice?

A Yes, sir.

Q How much did you serve that time?

A I stayed 14 days.

Q What other time?

A (No answer.)

Q Think hard. Have you ever served any time in any State Prison?

A Yes, sir.

Q Where?

A I served some time in Texas.

Q What year?

A '47, sir.

Q And what for?

A Stealing.

Q Stealing what?

A Money.

Q Well, where was this prison?

A It was in Sugar Land.

Q Sugar Land, Texas?

A Yes.

Q This is not the one you served in Gainesville, it?

A No, sir.

Q How long did you serve in Sugar Land?

A Well, I had five years, but I got out in — it was about 14 months.

Q But you were sentenced to five years?

A Yes, sir.

Q And you served 14 months of it?

A Yes, sir.

Q All right. Have you served any time in any other State Penitentiary?

A No, sir.

Q Any Federal Penitentiary?

A No, sir.

Q How long did you say your have known this Cooper boy?

A I have known him since '51.

Q What trouble has he been in?

A I don't know, sir.

Q Has he been in any trouble since you have known him?

A See, sir, I wasn't around always from '51 up until now. I was around about three months in '51, and in '52 I didn't see him lately up until November when we started coming down here.

Q Did Mrs. Miskovich live in that store there all by herself?

A Yes, I guess so.

Q You knew that she did, didn't you?

A No, sir. I didn't know whether she lived there by herself or not, because I had never been down there at night.

Q You say you had never been down there at night?

A Yes.

Q Well, Cooper had been down there before, hadn't he?

A Yes, sir. He used to go down there and get beer. You could tell when the store was closed. You could walk on the outside and the light would be cut off. I said, "You can't get no more beer. The light is cut off."

He said, "I can get it," and he went down to get it.

Q You never have had any insanity in your family, have you?

A Not as I know, sir.

Q When you went to school you didn't have any trouble doing the ordinary school work, did you?

A No, sir.

Q As far as you know you are a normal person as far as your mentality is concerned, aren't you?

A Yes, as far as I know.

Q When you saw Cooper standing over the top of Mrs. Miskovich with this knife in his hand, she didn't

have anything in her hands, did she?

A No, sir.

Q Just the two of them there, and he had this long butcher knife and she didn't have anything?

A No, sir.

Q When you first walked in did you say that she was on the bed?

A Yes.

Q Now was she laying down in the bed like I am now, or how was she?

A No, sir, she wasn't laying down like. She was laying kind of across the bed or something.

Q And he was standing up?

A Yes, sir, he was standing up and leaning over the bed when I grabbed him.

Q And he had the knife in which hand?

A He had the knife in his — right hand. In his right hand, because I am righthanded myself, and that is the way he is.

Q Didn't his hand pretty well cover the handle of that knife?

A Yes, it pretty well covered it.

Q And you grabbed the blade of the knife?

A Yes, sir. I grabbed a little part of the handle and his hand, and had just a little bit, my two fingers

there, on part of the blade. That it how I got cut, when he snatched it, by me having a little piece of the blade.

Q How did your fingerprints get on the handle of the knife?

A My fingerprints on the handle of the knife?

Q Yes.

A When I grabbed hold of it, I guess.

Q It couldn't have been. You said that his hand was covering the knife. How did your fingerprints get on the handle?

A I said his hand was covering the knife, part of the knife, and it was just like that there. (Indicating.) Right up around the top edge, and I grabbed hold and I grabbed what was left and had one or two of my fingers, had one of my fingers there over his, and I grabbed his like that there. That is the way I grabbed it; just like that. (Indicating.)

Q So that is how you figure your finger prints got on the handle of that knife?

A That is the only way I can see it.

Q You had better start telling me the truth.

A I am telling you the truth.

Q No, you are not telling me the truth, because your fingerprints wouldn't be on the handle of that knife if you were telling me the truth. And don't give me that cock and bull story, because I am not going to believe it. When did you have that knife in your hand?

A I don't know any time my hand ever come in contact with that knife.

Q Now think hard.

A Yes, sir. I am thinking. My hand never come in contact with that knife. He had some white gloves he had on.

Q He had what?

A White gloves on. He had gloves on.

Q Where did he get them?

A I don't know. I thought maybe he brought them.

Q When did he have the white gloves on his hand?

A He had them on when I run back around to the store where he was when I heard the lady holler.

Q Did he have the white gloves on when he left you in fro t of the store?

A No, sir.

Q On the way down there from the house to the store did he say anything about he was going to put on some gloves?

A No, sir, he didn't say nothing. See, I was under the impression he was going around to get the beer like he always do.

Q But he didn't have any gloves on when he went around the back?

A No, sir.

Q But when you saw him standing over the top of bed with this knife he did have some gloves on?

A Yes, he did have them on.

Q Cotton gloves or leather gloves or what?

A Cotton gloves.

Q Did you have any gloves on?

A No, sir.

Q Maybe that is why your fingerprints are on that knife. Do you suppose?

A I don't know, but I don't wear no gloves even when I am working. Just don't ever wear none.

Q Well, do you imagine he put these white gloves on so that your fingerprints would be on that knife and his wouldn't, so that you would be hooked for this murder and he wouldn't?

A No, sir, I don't think that happened.

Q Well, what do you think about it now with your fingerprints on that knife?

A I don't know.

Q Well, he is a pretty smart boy, isn't he?

A No, sir, he don't act like it.

Q Well, I am going to let you go now for a little while. Now everything that you have told me has been the truth, hasn't it?

A Yes, sir.

Q And you swear to God that it is the truth?

A Yes, sir.

Q And everything you told me you have voluntarily told me, haven't you?

A Yes.

Q And you understand, like I told you when we started, that I am not making you any promises if you do talk to me; I am not making you any promises if you don't talk; and I am not making you any threats if you don't talk? You understand that?

A Yes.

Q And you understand that when you started you didn't have to talk to me unless you wanted to. Do you understand that?

A Yes.

Q All right. Just one second.

Well, now when you went down there this morning to the store, you knew from what you heard around there that she had been hit on the head and her skull fractured, didn't you?

A No, sir, I didn't know she had been hit on the head.

Q Well, when you went down there this morning how did you learn that she was killed?

A Well, I didn't know whether he stabbed her last night, but I knew she hollered and I figured he had hit her or something, but I didn't see what it is. All I know

was the corner of her mouth was bleeding, and this morning —

Q Wait a minute. Don't go so fast. What makes you think he hit her last night?

A By her screaming and I saw blood when I came in, saw blood coming out of her mouth.

Q But that is all that makes you think, believe that she was hit last night?

A Yes, sir.

Q Well, okay for the time being.

CONSTITUTION OF THE UNITED STATES

"Amendment (V.)

"No person shall be held to answer for a capital, or othedwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

CONSTITUTION OF ARIZONA

(Article 2)

"§ 8. *Right to privacy*

"Section 8. No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

"§ 10. *Self-incrimination; double jeopardy*

"Section 10. No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.'